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Supreme Court, U.S.
FILED
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No.

# In The
# Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,
*Petitioners,*

v.

BANK OF CHINA,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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February 21, 2008

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## QUESTIONS PRESENTED

1. Whether, under a widening conflict left unresolved in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the jurisdiction of United States courts, under the first clause of the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA), is to be determined by a (i) "literal" standard as applied for the first time by the Tenth Circuit below, (ii) "tighter nexus" standard as applied by the Second and District of Columbia Circuits, (iii) "nexus" standard as variously applied in other circuits, or (iv) "doing business" standard as applied in the Ninth Circuit.

2. Whether the purely commercial activities of a foreign state, under an agreement formed in the United States to safeguard funds and cross-border banking services carried out in part through its U.S. branch, confer jurisdiction in United States courts under the first, second and third clauses of the FSIA "commercial activity" exception.

3. Whether the jurisdiction of United States courts over an "action," "transaction or occurrence" may properly be limited to a single "act," and a U.S. citizen required to split claims for discovery and trial while directed to litigate the rest of its split claims abroad, under the third clause of the FSIA "commercial activity" exception, whose very purpose was to ensure U.S. citizens access to their courts against foreign states acting as private players in the marketplace.

## RULE 14.1(b) STATEMENT

The following entities were parties before the United States Court of Appeals for the Tenth Circuit:

Plaintiffs-Appellants-Cross-Appellees and Petitioners Orient Mineral Company ("Orient") and Wil-Bao Mineral Co., Ltd. ("Wil-Bao")

Defendant-Appellee-Cross-Appellant Bank of China.

Pursuant to this Court's Rule 29.6, petitioners state that Orient, a Nevada corporation, has no corporate parent and that no publicly held corporation owns 10 percent or more of its stock. Wil-Bao, a Chinese joint venture, is owned by Orient and a Chinese municipality-owned entity, and no publicly held corporation owns 10 percent or more of its stock.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Orient Mineral Company and Wil-Bao Mineral Co., Ltd. respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-58a) is reported at 506 F.3d 980 (10th Cir. 2007). Its prior opinion vacating the denial of dismissal (App. 107a-113a) is available at 2000 U.S. App. LEXIS 31764 (10th Cir. Dec. 12, 2000). Its opinion denying mandamus (App. 104a-106a) is unreported. The opinion of the District Court (App. __a-, attached separately in full), is unreported, as is its original vacated opinion (App. 114a-133a).

## JURISDICTION

The Tenth Circuit issued its opinion and entered judgment on October 24, 2007. This petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.5; time was extended for thirty days by the Honorable Stephen Breyer, Circuit Justice for the Tenth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

The statutory provisions involved in this case, 28 U.S.C. §§ 1330, 1391(f), 1602-1604, 1605(a)(2), 1606-1607, of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611 ("FSIA"), are reproduced at App. 134a-14-a.

The relevant "commercial activity" exception of the FSIA, codified at 28 U.S.C. § 1605(a)(2), provides: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ."

The relevant definitions, codified at 28 U.S.C. § 1603(d) and (e), provide: "(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act"; and (e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

The relevant provisions within the interconnected sections of the FSIA governing subject matter jurisdiction, 28 U.S.C. § 1330(a), personal jurisdiction,

28 U.S.C. § 1330(b), and sovereign immunity, 28 U.S.C. §§ 1604, 1605-1607, extend personal jurisdiction "to any claim for relief . . . arising out of any transaction or occurrence enumerated in sections 1605 – 1607 of this title," 28 U.S.C. § 1330(c), and "to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 . . ., or (b) arising out of the transaction or occurrence that is the subject matter of the claim . . . ." 28 U.S.C. § 1607(a),(b).

The relevant declarations of statutory purpose state:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States . . . in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602.

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to

> the same extent as a private individual under like circumstances. . . .

28 U.S.C. § 1606.

## STATEMENT OF THE CASE

Petitioner, Orient Mineral Company ("Orient"), a Nevada corporation, filed this case against Bank of China ("BOC"), a commercial bank owned by the People's Republic of China, to recover for breach of an agreement, formed in the United States, to safeguard Orient's investment funds in a Chinese joint venture, through BOC's failure to set and observe a $25,000 restriction on the joint venture's account, and allowing a rapid depletion of the funds through unauthorized transfers totaling $1.8 million, including a $400,000 transfer to Utah through BOC's branch in New York. The suit was later joined by the Chinese joint venture, Petitioner Wil-Bao Mineral Co., Ltd., a gold mining joint venture in China, formed by Orient and Jiaocun Gold Company, a municipality-owned entity of Jiaocun Town, Lingbao, China.

By letter of April 7, 1996, BOC represented that it was capable of administering the funds of the Wil-Bao joint venture, dollar exchange, and remittances for equipment purchases and profits. Before funding the joint venture, Orient sought further assurances that its funds would be safeguarded, which BOC provided by formal letter of May 14, 1996 received by Orient in Nevada, stating: "our bank will be responsible for safekeeping these funds . . . so that the funds can be used in the joint venture in accord with arrangements

made by the representative of the American party." App. 78a-79a. In reliance, Orient wired $3 million to BOC's New York branch, for transmittal to its branch in Lingbao, China. Orient by board resolution designated a special director, Preston Jones in Tennessee, with "sole" authority for disbursing its funds and arranging their use in the joint venture. Jones and other Orient representatives submitted the resolution to BOC officials at a meeting in China, which BOC translated. Jones also submitted a resolution of Wil-Bao's board, in Chinese and English, which confirmed he also had sole authority for Wil-Bao to approve disbursements over $25,000. Orient's agent in China, Yue Xiaocun ("Yue"), was Wil-Bao's general manager and an Orient shareholder and director who assisted as interpreter. Yue was to have signing authority on the Wil-Bao dollar account, subject to the $25,000 limit of its board. Instructing BOC through the documents and Yue, and understanding this control to be in place, Jones signed a transfer slip releasing Orient's $3 million into the Wil-Bao account. Two days later, Jones gave BOC his written authorization to transfer $1.215 million from Wil-Bao's account, for purchase of a mine and mill, and returned to the United States. Jones' sole reason for going to China was to assure the creation of a control account, subject to his authorization thereafter from Tennessee.

Within weeks of account opening, Yue embezzled virtually all funds remaining in the account by five transfers over $25,000 without Jones' authorization, including a $400,000 transfer to BOC's New York branch, which forwarded the funds to Yue's ex-wife's account in Utah. Yue was convicted in China.

## A. Proceedings in the District Court

In 1998, Orient brought suit in the District of Utah asserting breach of contract, fraud, negligent misrepresentation, negligence and conspiracy against BOC, based on its failure to safeguard the funds and follow the directions of Jones. Orient alleged BOC's failures allowed Yue to abscond with $1.8 million, and caused the loss of gold mines valued at over $4 million. BOC moved to dismiss, asserting immunity from suit under the Foreign Sovereign Immunities Act (FSIA). BOC claimed immunity, notwithstanding that it extended a formal offer and representation intended for Orient in the United States that it would safeguard funds and follow the directions of Orient's American representative, that its offer was accepted and representation relied upon in the United States by Orient's wiring of the funds, thus forming a contract in the United States, that it took custody of the funds at its New York branch, that it routed through that branch two remittances to Nevada and an unauthorized transfer to Utah, and that it omitted to obtain authorization from Jones in Tennessee for the Utah transfer and four transfers over $25,000 in China, all comprising commercial activity carried on in and having substantial contact with the United States.

In 1999, the court denied BOC's motion, finding probable jurisdiction under the third clause of the FSIA "commercial activity" exception, 28 U.S.C. § 1605(a)(2), but only as to the Utah transfer, not recognizing that this transfer triggered jurisdiction over the action, or addressing the first or second clause. App. 124a. The court found "the 'act by which

the defendant purposefully avails itself of . . . this forum, if any, must be [BOC's] transfer of $400,000 to Zions Bank," and personal jurisdiction "based upon its 'contacts' represented by the $400,000 transfer." App. 126a-128a. In 2000, on interlocutory review sought by BOC, the Tenth Circuit vacated the finding of jurisdiction "over the controversy," for resolution of whether service was effected. App. 109a, 113a. On remand, service was perfected, and Wil-Bao added by amended complaint. BOC filed an answer, but objected to discovery.

In May, 2002, the court ordered abbreviated discovery as to the Nevada remittances and unauthorized Utah transfer. When Petitioners expressed concern over being forced "to pretrial and then trial without having discovery on the merits of the other transfers," the court responded: "If you want to sue them on transfers in China go to China. We'll deal with the 3 [Nevada and Utah transfers], that's what we'll deal with at this point as far as discovery goes." App. 82a-83a.

At pretrial in February, 2003, the court again declined jurisdiction over the other transfers, failing still to address clauses one and two of Section 1605(a)(2).[1] The court then summarily dismissed

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[1] The relevant colloquy proceeded as follows:

> THE COURT: [U]sing your theory. . .they didn't keep your funds safe. . . . They didn't do what they promised you they'd do but that doesn't necessarily equate to fraud. . . .
> MR. LUDWIG: Well I tried to argue that evidence in support

Orient on finding BOC did what Jones directed by processing a transfer slip releasing Orient's $3 million into the Wil-Bao account, without the $25,000 restriction, while acknowledging "there may be some question as to whether [BOC] did what Jones said." App. 93a-96a. Petitioners' motion to reconsider, or certify for interlocutory review of the court's jurisdiction and premature fact-finding in advance of hearing the evidence, was denied.

Petitioners sought mandamus, asking the Tenth Circuit to compel the district judge to exercise

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of the fraud theory and the court refused to hear that evidence and said that the [other transfers] are not at issue[,] it's only the $400,000 transfer. . . .
THE COURT: [I]f you want to sue them in China have at it. We're dealing with the impact here. . . .
MR. LUDWIG: . . . clearly that changes the complexion of the case not only in a damages sense but apparently in the court's view as to what evidence is relevant and admissible to support our claims.
. . .
MR. LUDWIG: . . . [Plaintiffs sued in the U.S.] . . . and we think we're supported in that under the FSIA and applicable case law. Is the court ruling that we may recover no more than the $400,000 transfer. . . ?
[THE COURT]: Well that's the one where there's the impact.
MR. LUDWIG: Well impact is . . . the third prong only of Section 1605(a)(2) of FSIA. I've argued all 3 prongs. I've also argued that the impact is broader. . . . I think that if the court is going to reduce the scope to $400,000 . . . [i]t might make more sense if that's the court's ruling to permit an interlocutory appeal–
THE COURT: No. We're going to try that case. . . .
[App. 86a-92a]

jurisdiction over the entire action, or direct his recusal. While the petition was pending, the district court reconsidered its prior order, allowing Orient back into the case and Petitioners to seek to recover upon other unauthorized transfers, but only subsequent to the Utah transfer as consequential damages. The Tenth Circuit denied mandamus. App. 104a-105a.

In April 2004 the court conducted a bench trial, denying an advisory jury. On January 26, 2005, the court reentered its same finding as before, that BOC followed Jones' direction by processing the transfer slip, failing to address BOC's admission that it was required to follow Jones' direction in opening the Wil-Bao account. App. 98a. The court reaffirmed jurisdiction over the Utah transfer, App. 73a, and ordered judgment dismissing Petitioners' action as to that transfer on the merits, and the rest for lack of jurisdiction. App. 77a. Nonetheless, the court announced it had decided "the merits of Plaintiffs' claims in their entirety" if reversed on jurisdictional grounds, App. 75a, regardless of discovery.

In its conclusions of law, the court recognized that Petitioners "assert FSIA jurisdiction over this case on all three bases set forth in § 1605(a)(2)," App. 67a-70a, but still failed to address clause one or two. App. 65a-76a. The court's 235-page opinion disregarded determinative undisputed facts, nowhere mentioning BOC's activities in the United States, including that it routed the Utah transfer and two Nevada remittances through its New York branch, through which it took custody of Orient's funds.

Instead, the court limited its evaluation to clause three, as it had in 1999, ruling: "The court was and is persuaded that the Bank's [transfer to Utah] had a 'direct effect in the United States' within the meaning of" the clause. App. 73a. The court rejected the contention that this breach of the contract to safeguard funds extended jurisdiction over the case. App. 74a.

### B. The Court of Appeals Proceedings

Four questions were presented to the Tenth Circuit: (1) whether the district court erred in limiting jurisdiction under clause three to a split claim, while ignoring clauses one and two, and limiting discovery and effectively trial to one transfer; (2) whether it precluded a fair trial in denying discovery as to all but one transfer, and making findings on transfers for which discovery was denied; (3) whether based on an incomplete and distorted record, its findings were clearly erroneous; and (4) whether the Court of Appeals should determine facts not in dispute, direct judgment for Petitioners on their contract and negligence claims, and reassign the rest to a new judge, where the court pre-judged the case.

The Tenth Circuit reached only the first question, affirming jurisdiction under the third clause limited to the Utah transfer. App. 42a. Addressing the remaining clauses without a ruling below, the court held clause one not satisfied, viewing in isolation, rather than cumulatively, each of the "several ways in which [Plaintiffs assert] BOC carries on commercial activity in the United States":

> First, the Bank drafted a letter, dated May 14, 1996, promising to keep safe the funds. . . . [Orient] then responded . . . [with] documents . . . to China. This series of events can not be construed as the Bank's carrying on commercial activity in the United States.
>
> . . .
>
> Plaintiffs point to the fact that . . . [the $3 million] wire transfer went through the Bank's New York branch. And when the Bank transferred Wil-Bao funds back . . . as Jones requested, those transfers also may have gone through the New York branch. These connections alone, however, are insufficient . . . because none of Plaintiff's claims . . . are 'based upon' these particular transactions.
>
> Plaintiffs further argue that the Bank's transfer of $400,000 of Wil-Bao's funds to the bank in Utah amounts to . . . commercial activity in the United States. We later conclude that this activity [satisfies the third clause]. However, we do not believe this single act constitutes 'commercial activity carried on in the United States' . . . The Bank acted within China, not the United States.

App. 26a-31a (emphasis in original). The Tenth Circuit, like the district court, nowhere acknowledged that BOC's transfer to Utah was conducted through its New York branch, or that branch's acts in forwarding the funds to Utah, as its senior official testified:

> [T]his fund was transferred through many levels of transaction, we had to go through Sanmenxia. Sanmenxia had to go through Hunan. . . . Then . . . New York had to transfer the fund into bank here that's stated on this voucher . . . not only involve branch had to be responsible for this, Sanmenxia branch, Hunan . . . and the New York branch. . . . [App. 100a]

Addressing clause two, the Tenth Circuit held it unsatisfied for "the same reasons," that the action was not based upon "any action the Bank took in the United States." App. 32a. The court expressly did not reach Petitioners' arguments "that the district court abused its discretion in limiting pretrial discovery to facts relevant only to this Utah transfer." App. 53a.

## REASONS FOR GRANTING THE WRIT

This case presents important questions and a widening conflict concerning the proper interpretation of the commercial activity exception of the FSIA. The Tenth Circuit's decision in this case marks the first time that any court of appeals has applied a "literal" interpretation to clause one of the exception, to deny jurisdiction over the action of a U.S. citizen based upon commercial activity of a foreign state which had substantial contact with the United States. The decision also marks the first time that any circuit court has held that introducing funds into the United States, *inter alia*, was an act that occurred only abroad, in denying jurisdiction under clauses one and two. This case likewise is the first time that jurisdiction under clause three was limited to a single

act, rather than exercised over the action, transaction or occurrence, as provided. These rulings are not only unprecedented, but wrong. Each conflicts with decisions of the Court and other circuits, misinterprets the FSIA, and defeats congressional intent.

The FSIA was enacted to bring United States practice in line with international law and the "restrictive" theory of sovereign immunity, to provide that when foreign states act in the marketplace as private players, they are so treated in United States courts, ensuring U.S. citizens access to their own courts for redress. *See* 28 U.S.C. § 1602, 1606. Transferring the determination of jurisdictional immunity from the State Department "to serve the interests of justice," the Act was intended to "protect the rights of *both* foreign states and litigants in United States courts." *Id.* § 1602 (emphasis added).

The FSIA also was intended to create a single rule of decision. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (noting "'importance of developing a uniform body of law in this area,'" quoting H.R. Report No. 1487, 94th Cong., 2nd Sess. 10, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6631 ("House Report"). The need for uniform application is particularly acute with respect to the commercial activity exception. *See* House Report at 6617 (describing exception as "most important instance in which foreign states are denied immunity.") Despite its importance, the Court has had occasion to address the exception only twice, in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349

(1993), analyzing in each case whether the activity was sovereign or commercial, but not the remaining "nexus" component—at least under the most consequential first clause of the exception—of whether that activity, if commercial, had "substantial contact" with the United States. After the critical sovereignty determination, subjecting foreign states engaged in commercial activity "to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 (1976). "[T]he need for merchants 'to have their rights determined in courts' outweighs any injury to foreign policy," to avoid "injury to the private party, who is denied justice . . . and a consequent injury to international trade." *Id.* at 706 n.18.

This "substantial contact" standard, contained in 28 U.S.C. § 1603(e), has never been interpreted by this Court. Thirty years after the FSIA's enactment in 1976, no consistent test has emerged for applying this fundamental standard. The lower courts were anticipating fifteen years ago that *Nelson* would resolve the "thicket of statutory interpretation and gloss," *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir. 1992), but the Court held: "Because we conclude that the suit is not based upon any commercial activity, we need not reach the issue of substantial contact with the United States." 507 U.S. at 356. The lack of guidance has led to a four-way circuit split in clause one decisions, creating the recurrent problem that an American litigant's protected right to its own courts varies by circuit.

This Court should grant the petition for three reasons. First, the Tenth Circuit's "literal" approach completes, among the circuits, a four-way doctrinal split to clause one that was left unresolved in *Nelson*.

Second, the untenable analysis and result in this case, and a similarly untenable decision the week before in *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007), illustrates how far the courts routinely depart from the language and intent of the Act, and the pervasive confusion that exists in determining when clause one confers jurisdiction. This Court's guidance is necessary to overcome the gloss that has obscured the fact that Congress derived the term "substantial contact" from the "substantial connection" equivalent to minimum contacts established in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957), and intended that the courts apply the principles of *in personam* jurisdiction over nonresidents laid down by this Court, not a new, more stringent standard.

Third, this Court is asked to review the Tenth Circuit's rulings affirming the exercise of jurisdiction narrowed to a single act, and the direction that a U.S. citizen pursue the remnants of its splintered claims in China. These rulings, and the sanctioning of, *inter alia*, a district court's delay of jurisdictional findings until trial, and forcing Petitioners to trial on less than full discovery, which other circuits term "inappropriate" and "grossly unfair," have so departed from the accepted course of proceedings as to call for this Court's supervisory power.

## I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

### A. As To Clause One Of 28 U.S.C. § 1605(a)(2), The Tenth Circuit's Holding Conflicts With Decisions Of Other Circuits, Widening A Split This Court Left for Future Resolution In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)

Clause one of the FSIA commercial activity exception bestows jurisdiction over foreign states in United States courts in any case "in which the action is based upon a commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular transaction or act," *id.* § 1603(d), and "commercial activity carried on in the United States" as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). The legislative history explains that "a commercial activity carried on in the United States by a foreign state would include . . . cases based on commercial transactions performed in whole or in part in the United States," House Report at 6615-16.

### 1. The Tenth Circuit's Literal Approach, Requiring the Alleged Wrongful Acts to Occur in the United States, Completes a Four-Way Circuit Split

The nexus component of clause one requires that Petitioners' action be based upon "activity carried on in the United States," 28 U.S.C. § 1605(a)(2), that is, activity having "substantial contact with the United States." *Id.* § 1603(e). Clause one expresses no requirement that the wrong occur in the United States; that requirement is expressed in clause two.

The Tenth Circuit held, nonetheless, that clause one requires the wrong complained of to occur in the United States. Addressing BOC's unauthorized transfer through its New York branch to Utah, the Tenth Circuit ruled: "we do not believe this single act constitutes 'commercial activity carried on in the United States' by the Bank under the first clause of § 1605(a)(2). The Bank acted within China, not the United States." App. 31a.

The Second Circuit, by contrast, held in *Ministry of Supply v. Universe Tankships, Inc.* 708 F.2d 80 (2d Cir. 1983), that "the first clause . . . withdraws immunity . . . based not only on acts within . . . but . . . outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' or 'particular commercial transaction' having substantial contact with the United States." *Id.* at 84. The court found the claim based on the "entire course of activity in arranging in the United States for the purchase of the wheat and its transportation to Egypt,

not simply on the acts done (or not done) . . . in . . . unloading at Port Said." *Id.* The court cited the House Report, noting "the 'substantial contact' standard of § 1603(e) can be met by as little activity as 'receiv[ing] financing from'" the United States, *id.* at 84, indicating the standard is determined by the contacts of the activity itself—receiving financing from the United States—not necessarily its breach.

The Third Circuit held in *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980): "The only way . . . the first clause . . . could be read not to comprehend Sugarman's claim . . . is to construe the phrase 'in which the action is based upon a commercial activity carried on in . . .' to be a requirement that the particular misconduct . . . take place 'in the United States.' But so limiting a construction is belied by the very next clause, which excepts from immunity an action 'based . . . upon an act performed in the United States in connection with a commercial activity . . . elsewhere.' When Congress intended to limit . . . liability to acts carried out . . . in the United States, the statute makes that limitation clear." *Id.* at 273. The court held only a "nexus" is required between the grievance and the activity "in the United States." *Id. See also Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981) ("It is immaterial that the acts constituting breach of contract may have taken place outside the United States").

The Fifth Circuit in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984), concurred: "We believe that the Third Circuit's nexus

interpretation of the first clause . . . is sound and therefore adopt it as our own. We note first that this clause cannot mean what it literally says. A literal reading of the clause would require the act complained of to occur in the United States; 'the drafters of the FSIA intended no such niggardly construction.'" *Id.* at 202 (citations omitted).

The Tenth Circuit's approach is one of four divergent approaches to clause one that preexisted and was not resolved in *Nelson*. The decision below, *Nelson v. Saudi Arabia,* 923 F.2d 1528 (11th Cir. 1991), reported that "the courts had varying interpretations of the jurisdictional reach of the first clause," *id.* at 1534, citing *Vencedora,* in which the Fifth Circuit summarized the conflict:

> Despite strong congressional intent to promote uniformity in decision making through judicial application of the first clause . . ., judicial readings of this clause have not been consistent. Courts of appeals and district courts have announced widely varying formulations of the jurisdictional scope of this clause, and these formulations may be divided into four categories: (1) a "literal" approach; (2) a "nexus" approach; (3) a bifurcated literal and nexus approach; and (4) a "doing business" approach.

730 F.2d at 199-200. Of these four variants, the circuits were then divided between the "nexus" approach, and the "bifurcated" or "tighter nexus" approach. The latter, requiring that the "activity in the United States constitutes or directly causes the

occurrence of an element of the cause of action," was applied by the D.C. Circuit in *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982), and the Second Circuit in its more recent decisions in *Kensington*, 505 F.3d at 156 ("'considerably greater than common law causation'") (citation omitted), and *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991) ("tighter nexus").

Prior to *Nelson*, no circuit had adopted either the "literal" or the "doing business" approach. *See Vencedora*, 730 F.2d at 200-01. Since *Nelson*, the "doing business" approach has been adopted by the Ninth Circuit in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1998), following dissents by Justice Stevens in *Nelson*, 507 U.S. at 379 & n.3, and Judge Higginbotham in *Vencedora*, 730 F.2d at 204-10.

No circuit court, however, until the Tenth Circuit decision below, had ever adopted the "literal" approach. "This literal reading of the first clause," as summarized in *Vencedora*, "was rejected by the *Gibbons* court, and, on the rare instances where it has been applied by district courts, it has been repudiated by the circuits." 730 F.2d at 200 (citing, *inter alia*, *Gibbons v. Udaras*, 549 F. Supp. 1094 (S.D.N.Y. 1982) and *Sugarman*). Nothing in clause one requires that the acts complained of occur in the United States. As framed in *Nelson*, the "action must be 'based upon' some 'commercial activity' by [a foreign state] that had 'substantial contact' with the United States within the meaning of the Act." 507 U.S. at 356. While the Tenth Circuit recited this passage, App. 23a, it proceeded to

consider only the literal meaning of clause one's language—"activity carried on in the United States", 28 U.S.C. § 1605(a)(2)—without applying its definition as highlighted in *Nelson*—"having substantial contact with the United States" 28 U.S.C. § 1603(e)—in effect reading the definition out of the Act. Its literal construction also renders clause one itself meaningless by limiting its scope to acts otherwise actionable under clause two, as recognized in *Sugarman*.

A Second Circuit decision handed down a week before this case, *Kensington Int'l,* may be read to have likewise applied a literal approach, by its language: "we cannot agree . . . that its action is 'based upon' the alleged acts in the United States," 505 F.3d at 156. Similarly, the Fifth Circuit, having repudiated the literal approach in *Vencedora*, nearly applied it in another decision involving BOC, stating: "The question, then, is whether Bank of China's failure to pay occurred in the United States (first clause)," *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998), but found clause three satisfied and did not reach clause one. To pose the wrong question, however, is to reach the wrong result, which is what the Tenth Circuit did in this case, widening a split that should be resolved by this Court.

### 2. The Tenth Circuit's Approach Conflicts with the Teachings of *Nelson* and Decisions of Other Circuits as to "Substantial Contact"

Believing clause one required that the acts complained of take place in the United States, and not

finding such acts, the Tenth Circuit never considered the scope of BOC's activity and its connection to the United States, electing instead to view each activity or act separately, in conflict with the teachings of *Nelson* and the decisions of other circuits.

*Nelson* explained: "We begin our analysis by identifying the particular conduct on which the . . . action is 'based,' 507 U.S. at 356-57 (citing *Texas Trading & Milling Corp. v. Federal Rep. of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981)). *Texas Trading* stated: "our first task is to identify what particular conduct . . . is relevant. Subsection 1603(d) states that 'commercial activity' might consist of either 'a regular course of commercial conduct' or 'a particular commercial transaction or act.' The words "regular course of conduct' seem to authorize courts to cast the net wide, and to identify a broad series of acts as the relevant set of activities. Here, the relevant 'course of conduct' is undoubtedly Nigeria's massive cement purchase program. House Report at 6615. Alternatively, each of its contracts . . . qualify as 'a particular transaction.'" 647 F.2d at 308. By contrast, the Court noted in *Nelson*: "The Nelsons have not, after all, alleged breach of contract, 507 U.S. at 358.

Here, Petitioners did allege a breach of contract to safeguard funds, as the heart of their case, involving as in *Texas Trading* both a "course of conduct"—BOC's cross-border banking activities in this case, and a "particular transaction"—its contract. As the Tenth Circuit otherwise recognized: "all of [plaintiffs'] claims are based on the Bank's alleged breach of a duty, created contractually or otherwise, 1) to keep safe the

funds Orient Mineral wired to its temporary account in BOC's Lingbao sub-branch, and to disburse those funds only according to Jones' directions; and 2) to require Jones' authorization for any withdrawals from Wil-Bao's accounts in an amount greater than $25,000." App. 24a-26a. This duty arose from a contract "created . . . in the United States" as "[t]he district court agreed." App. 28a.

1. Parsing BOC's activity in search of actionable wrongs in the United States, the Tenth Circuit did not determine whether BOC's course of conduct and contract, on which it recognized "all of [plaintiffs'] claims are based," cumulatively had substantial contact with the United States, in conflict with the decision of the Fourth Circuit on which it relied. The Tenth Circuit reasoned: "'Our focus, then, must be on the 'specific claim[s]' . . . and the elements of th[ose] claim[s] that, 'if proven would entitle [Plaintiffs] to relief under [their] theory of the case.' *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir. 2004) (quoting *Nelson*).'" App. 24a-25a. The passage quoted, derived from *Nelson*, addressed only whether the activity was sovereign. The Fourth Circuit, after finding commercial activity under *Nelson*, 376 F.3d at 286, then found "substantial contact" in a passage the Tenth Circuit did not cite: "It is readily apparent that Tenex's conduct has "substantial contact with the United States" and thus fits comfortably under this definition. First, GNSS is a United States corporation. Second, under the terms of the Tenex Contract, Tenex transfers to GNSS title to uranium . . . located within the United States. Third, Tenex's notice of

termination" was served in Maryland. *Id.* at 291-92. BOC's conduct fits just as comfortably. Orient is a U.S. corporation. The contract was formed here. BOC took custody of the funds at its New York branch, and remitted funds to Nevada. BOC breached contract and tort duties created here by not placing a restriction on the Wil-Bao account, and transferring funds without Jones' authorizations from Tennessee, including through its New York branch to Utah.

In applying *Nelson's* analysis for determining sovereign activity, in lieu of the substantial contact standard, the Tenth Circuit is not alone. As recently analyzed by the Second Circuit in *Kensington Int'l*: "The Supreme Court has found that the phrase 'based upon' in the first [clause] . . . is 'read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory.' The term 'calls for something more than a mere connection with, or relation to, commercial activity.'" 505 F.3d at 155 (quoting *Nelson*). The Second Circuit applied that test without citing the substantial contact standard. What such decisions overlook is that *Nelson's* language addressing a *connection or relation to commercial activity* concerns whether the activity is sovereign or commercial, not whether that *activity, once found to be commercial, has a connection (or substantial contact) to the United States*. Misreading *Nelson*, such decisions fail to observe Justice Stevens' caution: "These two conditions should be separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the

assertion of jurisdiction over the defendant." 507 U.S. at 377 (Stevens, J., dissenting).

Applying this common misconception of *Nelson*, neither the recent Tenth or Second Circuit decision applied the substantial contact standard, in disregard of the text and purpose of the statute, and in conflict with at least the Fourth and Sixth Circuits. The Fourth Circuit decision post-dated *Nelson*, yet resisted the tendency to apply *Nelson's* element analysis for determining sovereign activity to jurisdictional contacts, a different concept. Prior to *Nelson*, the Sixth Circuit made this point in *Gould , Inc. v. Mitsui Mining & Smelting Co.* ("*Gould II*"), 947 F.2d 218 (6th Cir. 1991): "The 'commercial activity' is the jurisdictional element, just as the presence of the defendant in the forum state is the jurisdictional element in cases raising issues of personal jurisdiction. In personal jurisdiction cases, we do not require the plaintiff to prove the elements of the cause of action stated in order to sustain jurisdiction." *Id.* at 221 (finding activities "involved substantial contact with the United States").

2. Even viewing BOC's activities in isolation rather than cumulatively as required, the Tenth Circuit's holding that the creation of contract and tort duties in the United States does not satisfy clause one, conflicts directly with the decisions of most circuits. The Tenth Circuit stated that BOC's contract to safeguard funds was "created . . . in the United States" as "[t]he district court agreed." Op. at 26, n.18. Nonetheless, the Tenth Circuit held: "Even so, BOC's actions in this regard are insufficient to establish that

BOC was carrying on commercial activity in the United States," concluding that the contract was negotiated and to be performed in China. This ruling places the Tenth Circuit in direct conflict with numerous "safe passage" decisions involving a flight and injury overseas, holding clause one satisfied through a mere ticket purchase in the United States, regardless of negotiation. *See, e.g., Barkanic v. CAAC*, 822 F.2d 11, 13 (2d Cir. 1987) (travel in China ticketed in United States), *Sugarman, supra*; *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (noting House Report "states that the making of 'a single contract' in the United States can support jurisdiction"); *Kirkham v. Air France*, 429 F.3d 288 (D.C. Cir. 2005). The same principle applies no less to a simple contract to safeguard funds.

3. Viewed also improperly in isolation, the Tenth Circuit's ruling that BOC's "single act" of transferring funds to Utah does not satisfy clause one because the act occurred "within China, not the United States," conflicts not only with all other circuits, but also with the Second Circuit decision in *Shapiro*, holding that "transportation to this country" of promissory notes "constituted 'substantial contact' . . ." 930 F.2d at 1019. "We know of no theory that would cause us to read the FSIA to allow a foreign state to issue bearer notes to an intermediary in the United States and then to deny that it was engaged in commercial activity as defined in the FSIA. The very presence of such highly transferable instruments . . . suffices to satisfy the 'substantial contact' requirement of the statute." *Id.*

The ruling also conflicts with decisions of the Second Circuit in *Texas Trading* and of the Fifth Circuit in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), noting: "'Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning 'where' an act or omission occurs. Conduct crucial to modern commerce . . . transfers of intangible debits and credits – can take place in several jurisdictions. Outmoded rules placing such activity 'in' one jurisdiction or another are not helpful here.'" *Id.* at 1112 (quoting *Texas Trading*). The ruling further conflicts with decisions of other circuits, recognizing: "It is clear that both the place of sending and place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used to transmit communications." *Travis v. Anthes Imperial, Ltd.*, 473 F.2d 515, 526 n.16 (8th Cir. 1973).

### B. As To Clause Two, The Tenth Circuit Holding That A Funds Transfer Does Not Constitute "An Act Performed In The United States" Conflicts With Decisions Of Other Circuits

Clause two of the exception provides jurisdiction in any case in which the action is based on "an act performed in the United States in connection with commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Conduct that confers jurisdiction under clause one often satisfies clause two as well. *Santos*, 934 F.2d at 892.

Petitioners alleged that BOC induced Orient's reliance by means of a formal letter, which caused it to part with funds that were rapidly absconded in China. The action is based upon BOC's "act" of providing those assurances, its "acts" of introducing funds to the United States and of its New York branch in forwarding them to Utah, and its "omissions" to obtain Jones' authorizations from Tennessee for the five transfers over $25,000, all of which were "acts" performed in the United States in connection with its activities in China. Nonetheless, the Tenth Circuit found clause two unsatisfied, citing the "same reasons stated above," that the action was not based upon "any action BOC took in the United States." App. 32a.

With respect to the Utah transfer, this holding conflicts with decisions, *supra*, which hold such a view of instruments placed in U.S. commerce to be "entirely anomalous," and recognize that the "act" occurs both at the place of transfer and receipt.

As to inducement, the Ninth Circuit, by contrast, held in *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992) that allegations of soliciting guests in the United States "fall squarely within clause two," *id.* at 710. The D.C. Circuit in *Gilson* similarly held clause two satisfied, on allegations plaintiff was "induced" to enter into a venture in Ireland. 682 F.2d at 1024. The Tenth Circuit, addressing inducement under clause three, not clause two, held Orient's reliance "was ultimately the result of Yue's unlawful" intervening act, App. 38a-40a. That reasoning conflicts with *Gilson*, recognizing allegations of "collusion of all defendants," *id.* at 1027, as Petitioners similarly

alleged a conspiracy between BOC and Yue, negating any intervening cause.[2] App. 26a.

As for BOC's omission to obtain Jones' authorization for transfers over $25,000, the Tenth Circuit held: "But that omission, as alleged, occurred in the United States, and thus would not satisfy the third clause of § 1605(a)(2)." App. 40a. Had the court analyzed the issue under clause two and not three, it necessarily should have found that this omission "in the United States" conferred jurisdiction. *See* House Report at 6618 (noting "acts (or omissions) [are] encompassed in this category").

### C. As To Clause Three, The Tenth Circuit Holding That Narrowed Jurisdiction Over This "Action," "Transaction or Occurrence" To A Single "Act" Conflicts With Decisions Of This Court And The Second Circuit

Clause three of the exception similarly provides that a "foreign state shall not be immune from the jurisdiction of the courts of the United States in any case—(2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). In a case against a foreign state, personal jurisdiction is

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[2] The court also overlooked that BOC's formal letter conveyed through Yue itself evidences its promises were made to assure "the American party," as its author also admitted. App. 78a, 102a.

provided with respect to any claim "arising out of any transaction or occurrence enumerated in sections 1605 – 1607 of this title." 28 U.S.C. § 1330(c). "The term 'transaction or occurrence' includes each basis set forth in sections 1605-1607 for not granting immunity," House Report at 6612. *See also* 28 U.S.C. § 1607(a),(b).

In this case, Petitioners' claims were based upon a transaction or occurrence consisting of a contract and inducement to safeguard funds, as the Tenth Circuit recognized. App. 24a-26a; *see also* App. 44a ("the theory of recovery underlying most of Plaintiffs' claims is that the Bank breached its duty to follow Jones' directions"). Yet, the Tenth Circuit affirmed the district court's narrowing jurisdiction to the Utah transfer, sheering away the four others in China. The Tenth Circuit reasoned: "By its very terms, then, § 1605(a)(2)'s third clause gives American courts subject matter jurisdiction over claims stemming from a specific 'act' outside the United States that has a direct effect in the United States." App. 41a. Neither court below cited any authority for a construction focused on the term "act" and not "action," or that would justify splitting Petitioners' action, and "theory of recovery," into separate breaches.

The Tenth Circuit's holding squarely conflicts with the Second Circuit's decision in *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994), cited by Petitioners which the court did not address. *Rafidain Bank* was a suit against a commercial bank owned by Iraq based upon "loan agreements, guarantees, supplementary agreements and letters of credit," and Iraq's central bank "based on

[its] guarantees of Rafidain's obligations and on a letter of credit," *id.* at 239-40. Of all these instruments, "the agreements in Counts V-VII require[d] the Iraqi Banks to make payments in U.S dollars into accounts in New York City." *Id.* at 241. The court found that the "failure of the Iraqi Banks to remit funds in New York . . . had a direct effect in the United States under *Weltover*." *Id.* Although these effects arose from agreements referenced in certain counts, the Second Circuit held: "the Iraqi Banks do not enjoy sovereign immunity ***from any part of this action***." *Id.* (emphasis added).

This ruling also conflicts with *Weltover*, holding the district court "properly asserted jurisdiction, under the FSIA, over the breach-of-contract claim based on" Argentina's "rescheduling of the maturity dates on those instruments," 504 U.S. at 620. There the Court recognized the breach was the rescheduling, affecting multiple bonds, not one failure to pay. Similarly here, the breach was the failure to follow Jones' direction for a $25,000 restriction, not one resulting transfer. As emphasized by the Second Circuit in the decision below: "'Parsing the statute . . . is 'an enterprise fraught with artifice.' We have cautioned that, rather than getting steeped in the metaphysics of such amorphous terms. . . , courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign.'" 941 F.2d at 151 (citations omitted).

The Tenth Circuit's holding, steeped in the metaphysics of the term "act," drastically reduced Petitioners' action to a single act, in conflict with this

Court's seminal decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966): "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong." *Id.* at 722-24 (citation omitted). The Tenth Circuit's holding to limit the scope of clause three, defined like each clause to encompass any claim "arising out of any transaction or occurrence enumerated in sections 1605 – 1607," 28 U.S.C. § 1330(c), further conflicts with the Court's seminal "transaction" decision in *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). In *Moore*, the Court emphasized the "flexible meaning" of the term: "It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The [breach] . . . is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action." *Id.* at 610.

Nothing in clause three permits the exercise of jurisdiction over less than an action, transaction or occurrence—or claim for that matter—or permits directing a U.S. citizen to litigate a split claim partly in its courts and partly in China. On the contrary, as recognized in *Verlinden*: "When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,'" 461 U.S. at 488-89 (quoting § 1606).

## II. THIS CASE PRESENTS IMPORTANT AND RECURRING QUESTIONS OF FEDERAL LAW WHICH THIS COURT SHOULD RESOLVE

This case presents important issues that pre-existed *Nelson* and will not go away, until resolved by the Court. As this case shows, claims that can readily proceed in other circuits were dismissed in the Tenth Circuit, creating the very real and intolerable possibility that the availability of access and redress turns upon the circuit in which suit is brought. By allowing a conflict among the circuits to persist, this Court would paradoxically permit FSIA decisions to revert to the pattern of inconsistency Congress charged the judiciary to rectify. Only this Court can resolve the conflict, which is regularly recurring, and widening rather than resolving, in the absence of a workable standard. This Court should grant review to establish clear standards for clause one, as well as clauses two and three, that will guide the courts through a final important component of the FSIA statutory framework.

This case also presents an "opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act," *Texas Trading*, 647 F.2d at 307. Apart from resolving thirty years of disagreement, this Court should correct basic misconceptions of the FSIA that underlie much of the dispute, as well as the procedure followed in this case.

### A. The Tenth Circuit Decision Defeats Congress' Intent In Enacting The FSIA

This case starkly illustrates, by its unprecedented expansion of immunity under all three clauses, how the courts often fail to recognize that the FSIA's "general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) ("House Hearings"). The centrality of this purpose is declared in sections 1602 and 1606 of the Act, and was reiterated throughout its legislative history. *See, e.g.*, House Report at 6605.

At bottom, the FSIA was enacted to "bring American practice in the area of foreign sovereign immunity in line with the demands of the latter part of the 20th century," to ensure that the United States and its citizens are not placed "at a disadvantage." House Hearings at 32 (testimony of Bruno Ristau), 26-27 (testimony of Monroe Leigh). *See also Alfred Dunhill*, 425 U.S. at 703 (recognizing "[t]he potential injury to private businessmen – and ultimately to international trade itself"). The FSIA was special legislation by which the forum "manifest[ed its] interest in providing effective means of redress" for citizens injured by nonresidents. *McGee*, 355 U.S. at 223, a mandate infrequently applied by the courts.

### B. The Lower Courts Have Misconceived The Ordinary Meaning Of "Substantial Contact" As Used In The FSIA, Overlooking That Congress Derived The Term From This Court's Decision In *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)

The text and purpose of the FSIA have so thoroughly been reconstructed by a long succession of cases that the contours of what Congress actually said, and did, have been obscured, particularly as to the term "substantial contact." Given its ambiguity, evidenced by the four-way circuit split, the term must be read in light of the legislative history of the Act:

> (b) *Personal Jurisdiction.*—Section 1330(b) provides, ***in effect, a Federal long-arm statute*** over foreign states. . . . The requirements of ***minimum jurisdictional contacts*** and adequate notice ***are embodied in the provision***. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). . . . Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires ***some connection*** between the lawsuit and the United States. . . . These immunity provisions, therefore, prescribe the ***necessary contacts*** which must exist before our courts can exercise personal jurisdiction.

House Report at 6612 (emphasis added). In citing *International Shoe* and *McGee*, the drafters gave a pin-cite only to *McGee*, which held: "It is sufficient for

purposes of due process that the suit was based on a contract which had ***substantial connection*** with that State." 355 U.S. at 223 (emphasis added). The connection characterized as substantial was: "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of the State when he died." *Id.* (emphasis added). Since *McGee*, this Court has continued to apply a "substantial connection" standard, combining concepts of "minimum contacts" and "purposeful availment," explaining: "Jurisdiction is proper . . . where the contacts proximately resulted from actions by the defendant *himself* that create a 'substantial connection' with the forum," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (emphasis in original). *See also Hanson v. Denkla*, 357 U.S. 235, 252-53 (1958) (finding no "substantial connection").

It is evident, then, that Congress adapted the "substantial contact" standard for clause one from *McGee*, which the courts have overlooked.[3] The *McGee* pin-cite also evidently explains the nexus requirement for clause two, as this Court has held its test applicable to a single "act," explaining: "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction. *McGee* [], 355 U.S. at 223." *Burger King*, 471 U.S. at 476. Congress did not set a high bar for clause one, but explained that the standard "is intended to reflect a degree of

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[3] For example, the Second Circuit held "it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard for due process." *Shapiro*, 930 F.2d at 1019 (following D.C. Circuit).

contact beyond that occasioned simply by U.S. citizenship" of the plaintiff. House Report at 6616. This statement is consistent with *McGee*, which involved only two contacts besides residence. Those facts were met or exceeded here, warranting the exercise of jurisdiction over Petitioners' case.

### C. The Decision Below Sanctions Such Departures From Accepted Proceedings As To Call For This Court's Supervisory Power

Another "principal purpose" of the FSIA was "to assur[e] litigants that these often crucial decisions are made . . . under procedures that insure due process." House Report at 6606. In this case, not only were Petitioners forced to litigate a splintered portion of single unified claims, but were denied the usual discovery to prove that portion, and subjected to trial on the rest for which they were completely denied discovery, by a court that then decided "the merits of Plaintiffs' claims in their entirety." App. 75a. Postponing jurisdictional findings until trial and "requiring the plaintiff to prove the merits of the case" on less than full discovery is "inappropriate" and "grossly unfair." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *Gould II*, 947 F.2d at 221 (6th Cir. 1991).

Petitioners, by timely repeated motions to the district court, and by timely petition for mandamus to the Court of Appeals, provided opportunities for both courts below to rectify these serious breaches of statutory duty and fair procedure. Petitioners'

motions to the district court were simply ignored, and their petition to the Court of Appeals was summarily denied. These actions so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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## APPENDIX A

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**Nos. 05-4037, 05-4048, 05-4220**

**[Filed October 24, 2007]**

| | |
|---|---|
| ORIENT MINERAL COMPANY, a Nevada corporation; WIL-BAO MINERAL CO., a limited liability company formed under the laws of the People's Republic of China, | ) |
| Plaintiffs-Appellants, Cross-Appellees, | ) |
| v. | ) |
| BANK OF CHINA, a foreign banking institution doing business in the United States, | ) |
| Defendant-Appellee, Cross-Appellant. | ) |

**Appeal from the United States**
**District Court for the District of Utah**
**(D.C. No. 2:98-CV-238-BSJ)**

Robert W. Ludwig, Jr., Ludwig & Robinson, P.L.L.C., Washington, D.C. (Allan O. Walsh, McKay, Burton & Thurman, Salt Lake City, Utah, with him on the briefs) for Plaintiff-Appellants - Cross-Appellees Orient Mineral Company and Wil-Bao Mineral Company.

Christopher Brady, Butzel Long, a Professional Corporation, New York, New York (Orlee Goldfeld, Butzel Long, a Professional Corporation, New York, New York, and Arthur B. Berger, Ray Quinney & Nebeker, Salt Lake City, Utah, with him on the briefs) for Defendant-Appellee - Cross-Appellant Bank of China.

Before KELLY and EBEL, Circuit Judges, and MURGUIA,* District Judge.

## OPINION

EBEL, Circuit Judge.

These appeals require this court to determine, among other things, the extent to which investors in Chinese gold mines can sue the Bank of China (the "Bank") in an American court. Because the Bank was owned and operated by the People's Republic of China, an American court's subject matter jurisdiction must be found under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11. The FSIA provides that a foreign sovereign is generally immune from suit in

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* Honorable Carlos Murguia, United States District Judge of the District of Kansas, sitting by designation.

the United States. *See id.* § 1604. The FSIA's commercial activity exceptions, however, permit a foreign sovereign to be sued in a court within the United States, to the same extent as any private individual, when the sovereign is engaged in commercial activity that has a sufficient nexus to the United States. *See id.* § 1605(a)(2). In this case, while the Bank is generally engaged in commercial activity, we conclude, with one exception, that the Bank's specific commercial activity underlying Plaintiffs' claims does not have a sufficient nexus to the United States. As to the one exception, we agree with the district court that it had subject matter jurisdiction to consider Plaintiffs' claims to the extent they are based upon the Bank's transfer of $400,000 to a bank in Utah. We, therefore, AFFIRM the district court's jurisdictional rulings. We further AFFIRM the district court's ruling for the Bank on the merits of the claims over which it had jurisdiction. But we REVERSE the district court's dismissal of the Bank's counterclaim and REMAND the counterclaim to the district court for further proceedings.

## I. BACKGROUND[1]

Following a bench trial, the district court made these factual findings:

Plaintiff Orient Mineral Company ("Orient Mineral") is a Nevada corporation. Art Wilson was chairman of Orient Mineral's board of directors.

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[1] We GRANT Plaintiffs' motion to file a supplemental appendix in cross-appeals Nos. 05-4037, 05-4048.

Wilson met Yue Xiaoqun, also known as David Yue ("Yue"), a Chinese citizen, in 1994 while Yue was in the United States working for the China Foreign Development Company. Yue became a director and shareholder in Orient Mineral. And he interested Wilson in investing in Chinese gold mines.

In 1995, Wilson, aided by Yue, formed Plaintiff Wil-Bao Mineral Company, Ltd. ("Wil-Bao"), a joint venture created under Chinese law by Orient Mineral and a Chinese entity, Jiaocun Gold Company ("Jiaocun Gold'). Jiaocun Gold was wholly owned by the municipality of Jiaocun, China. Wil-Bao's purpose was to acquire gold mining properties in China's Henan province and then mine, mill and sell the gold extracted from these mines. Wil-Bao was headquartered in Lingbao, China.[2]

Wil-Bao's seven-member board of directors included four individuals associated with Orient Mineral: Wilson (chairman), Yue, F. Thomas Eck, III, Orient Mineral's president and general counsel, and John H. Mahan; and three members associated with Jiaocun Gold. Yue became Wil-Bao's general manager and John Zhang, who was Yue's brother-in-law, became Wil-Bao's finance manager.

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[2] The record also contains references to this city as Ling Bao and LingBao.

Wil-Bao was to have registered capital of $3 million.[3] Of that amount, Orient Mineral was to contribute $2.1 million–$1 million in cash and $1.1 million in mining equipment. Jiaocun Gold would contribute the right to use two existing mine sites and other fixed assets, worth a total of $900,000. As it turned out, Jiaocun Gold did not own the rights to any mines and ultimately contributed nothing to the joint venture.

Orient Mineral convinced R. Ellsworth McKee, a United States citizen from Tennessee, to fund this joint venture. McKee was chairman of the board for McKee Foods Corporation ("McKee Foods"). He was initially leery of this investment opportunity because he was unfamiliar with China and this opportunity involved a fairly risky gold mining venture.[4] McKee eventually agreed to invest $3 million, but only under certain terms and conditions designed to protect McKee's investment.

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[3] Unless otherwise specified, any reference to sums of money will be in United States dollars.

[4] This venture was actually riskier than McKee realized. At the time Orient Mineral created Wil-Bao and solicited McKee's financial investment, the Chinese government had imposed a moratorium on moving and milling gold ore. Therefore, while Wil-Bao could mine "some gold," it could not move, mill or sell any gold until the Chinese government lifted the moratorium. Orient Mineral failed to disclose the then-existing moratorium to its prospective investors, including McKee. The Chinese government eventually lifted the moratorium in 1997.

Those conditions included treating most of McKee's $3 million investment as a loan to Orient Mineral for Wil-Bao's benefit.[5] Moreover, Orient Mineral agreed with McKee to place Preston Jones on Orient Mineral's board of directors, replacing Mahan. Jones was McKee Foods' "director of corporate tax" and he also handled R. Ellsworth McKee's personal finances. Orient Mineral further agreed to give Jones "total control of the funds for Orient Mineral Company," appoint Jones to the Wil-Bao board of directors, and require Jones' authorization for all Wil-Bao expenditures over $25,000, "at least until such time as all loan funds had been repaid to Mr. McKee."

The next challenge was to get McKee's $3 million to China in a form that Wil-Bao could use. For this, the group turned to the Bank of China. The Bank is organized and exists under the laws of the People's Republic of China, has its principal office in Beijing, and operates a "sub-branch" in Lingbao, as well as a branch bank in New York City. At the time, the Bank was wholly owned and operated by the People's Republic of China.

Yue, who was in China acting as Wil-Bao's general manager, had already made several inquiries at the Bank's Lingbao sub-branch, asking, for instance, whether Wil-Bao could bring equipment, purchased abroad, into China, and about Wil-Bao's ability to convert its profits from the local Chinese currency "to foreign exchange to be remitted abroad." In May 1996,

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[5] McKee loaned Orient Mineral $2.9 million for Wil-Bao's benefit, and agreed to invest an additional $100,000 himself.

at Wilson's request, Yue arranged with the Bank's Lingbao sub-branch for a "temporary special holding account" to which Orient Mineral could wire the $3 million it had obtained from McKee. Also at Wilson's request, Yue asked for and received a letter from the Bank, dated May 14, 1996, which provided:

> Dear Mr. Yue Xiaoqun:
>
> Our bank already received your application on May 14, 1996, and we agree to establish in our bank a temporary U.S. Dollar account at the request of your honorable company (Sino-U.S. Joint Venture Henan Wil-Bao Metal Smelting Company, Ltd.). We now advise the relevant particulars as follows:
>
> Account name: ORIENT MINERAL CO.
> Account number: 14833
> Bank opening the account: Lingbao City Subbranch, Henan Provincial Branch Bank of China
>
> After the funds are transferred, our bank will be responsible for safekeeping these funds. Further, Mr. Yue Xiaocun [sic] must bring to our bank the business license of ORIENT MINERAL CO., the company chop,[6] and a company authorization letter, and go through the formalities, so that the funds can be used in

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[6] "Chop" in this context refers to the company's seal.

> the joint venture in accord with arrangements made by the representative of the American party.

(Footnote added.) This letter was written in Chinese and addressed to Yue.

Yue sent to Wilson, in Nevada, the Bank's letter, along with Yue's rough English explanation of the document. Wilson then had a friend who operated a Chinese restaurant translate the letter for him.

In preparation for the transfer of funds to China and pursuant to its agreement with McKee, Orient Mineral's Board of Directors, on May 16, 1996, passed a resolution that, among other things, provided that "Preston Jones shall be the sole and exclusive person to act on behalf of Orient Mineral Co. with respect to the disposition of all funds deposited in the Bank of China, Lingbao Branch of the HeNan Province." The resolution further provided that "the Board of Directors and Orient Mineral Co. shall hold the Bank of China harmless from all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China." This resolution had the appearance of a formal corporate document, impressed with Orient Mineral's corporate seal, signed by Orient Mineral's president, and attested to by its acting corporate secretary. Further,

> [a]ccompanying Orient Mineral's Board Resolution was a letter dated May 16, 1996, and also signed by Eck as Orient Mineral's President. This letter was on Orient Mineral's letterhead and bore the impression of its

> corporate seal. It was addressed to the Bank of China and enclosed the May 16th Board Resolution, which it characterized as authorizing Preston Jones as Orient Mineral's sole and exclusive agent to approve, direct, or otherwise designate the funds on deposit with the Bank pursuant to a wire transfer from McKee. The letter further stated that the May 16th Board Resolution was confirmed and ratified in all respects and that Preston Jones shall have full and complete authority with regard to the disposition of said funds.

On May 21, 1996, Plaintiffs initiated a wire transfer of $3 million from McKee's bank in the United States to the Bank's sub-branch in Lingbao. Jones, Wilson and Eck then traveled to China, where Yue met them and acted as their interpreter.

In keeping with promises made to McKee, the Wil-Bao Board of Directors met in China on May 24, 1996, and adopted a resolution that provided that, until Wil-Bao repaid McKee in full, "Preston Jones shall be appointed as the director of Wil Bao responsible for the management of the financial affairs of Wil Bao with the sole authority to approve any expenditure of Wil Bao in excess of $25,000 U.S. dollars." Unlike Orient Mineral's May 16 Board Resolution, the Wil-Bao resolution made no "reference to the Bank of China; nor does it bear any of the indicia of corporate authority (such as company letterhead, corporate seal imprint, secretary's attestation, officer's cover letter)."

On May 27, 1996, Jones, Wilson, Eck, Yue and John Zhang (Yue's brother-in-law) met with Bank

officials in Lingbao. The Americans at the meeting spoke only English, while the Bank's employees attending this meeting spoke only Chinese. Because Yue could speak and understand both languages, he acted as the interpreter for the entire group.

During this meeting, Orient Mineral's President, Eck, gave Bank officials 1) the Orient Mineral Board Resolution directing that only Jones possessed authority to dispose of the Orient Mineral funds that had been wired to the Bank's Lingbao sub-branch; and 2) Eck's letter to the Bank, dated May 16, 1996, reaffirming Jones' sole authority to distribute these funds. Bank officials had these documents translated into Chinese.

Jones then asked Yue to inform the Bank officials that the American group wanted to open a permanent account for *Orient Mineral.* But Yue instead informed Bank officials that the group wanted to open accounts for *Wil-Bao.* Yue then misinformed the Americans that Orient Mineral could not open its own account with the Bank because it was not registered to do business in China; they would, instead, have to open an account in the name of the joint venture, Wil-Bao. After some discussion, Jones, Wilson, and Eck agreed to open accounts in the name of Wil-Bao, so long as Jones still retained authority over any Wil-Bao expenditures over $25,000. The Americans then asked Yue to convey to Bank officials that this restriction be placed on the Wil-Bao accounts. The Americans assumed Yue did so. But Bank officials testified that Yue never informed

them that this restriction was to be placed on the *Wil-Bao* accounts.[7]

At Yue's request, the Bank opened two accounts for Wil-Bao, one for U.S. dollars, and the other for the local Chinese currency, Renminbi ("RMB"). Yue completed the account application forms and provided the Bank with three "chops," those of Wil-Bao, Yue, and his bother-in-law Zhang, Wil-Bao's financial director. These three "chops" would be required to negotiate any transaction at the Bank on Wil-Bao's behalf. No other withdrawal restrictions beyond the required three "chops" were placed on either account.

Believing, incorrectly, that he had sole authority to authorize expenditures greater than $25,000 from the Wil-Bao U.S. dollar account, Jones signed a bank transfer slip moving all of Orient Mineral's funds from its temporary account into Wil-Bao's U.S. dollar account. Before transferring the funds, the Bank verified Jones' identity by reviewing his passport.

Jones, Wilson, Eck and Yue met with one of the Bank's officials, Mr. Wang, at the Lingbao sub-branch on May 29, 1996. Yue again acted as interpreter for both sides. During that meeting, the Americans gave

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[7] Jones testified that Eck, during this May 27, 1996 meeting, also presented the Bank officials with a copy of the recently approved Wil-Bao resolution, which indicated that Jones had to authorize any expenditure of Wil-Bao funds in excess of $25,000. But the district court found that, "[m]ore likely than not, the May 24th Wil-Bao board resolution was presented to [the Bank's] Mr. Wang at the [later] May *29th* meeting at the Lingbao Sub-branch of the Bank of China." (Emphasis added.)

Wang the recently approved Wil-Bao resolution indicating Jones had to authorize any Wil-Bao expenditure greater than $25,000. In addition, the Americans gave Wang a handwritten note signed by Jones and Yue, by which Jones intended to authorize the transfer of $1.215 million from Wil-Bao's U.S. dollar account to its RMB account for the purchase of a gold mine, among other things.[8] This handwritten note stated:

| | |
|---|---|
| Authorization for David Yue Only | |
| Transfer Funds in To Wil-Bao | |
| 5/29/96 | |
| Funds AllocaTed For Use | |
| Mr. P[e]ng | $500,000- |
| Jiao Cun Town | 450,000- |
| Vehicles | 125,000- |
| Office Equip | 10,000- |
| OperaTing Funds | 130,000- |
| | $1,215,000 |

This process confirmed, at least for Jones, his (mis)understanding that the Bank would not pay out funds in excess of $25,000 from the Wil-Bao U.S. dollar account without his authorization. Further confirming Jones' mistaken belief, the Bank, on June 4, 1996, transferred $1.2 million from Wil-Bao's U.S. dollar account to its RMB account, after the Chinese State

[8] Wang does not recall receiving this handwritten note.

Administration Exchange Control ("SAEC") approved the transfer.[9]

After returning to the United States, Jones, on several occasions, sent Yue written authorization to transfer funds from the Wil-Bao U.S. dollar account to a Nevada company, Administrative Systems Corporation ("ASC"), in order to make interest payments owed to McKee. Yue made most of these transfers. But Bank officials testified that the Bank conducted these transactions based, not on Jones' written authorization, but on transfer slips filled out by Yue and accompanied by the three required "chops."

In the meantime, Yue was making other withdrawals from the Wil-Bao accounts, without Jones' knowledge or authorization. For example, on August 22, 1996, the Bank, at Yue's request, wired $400,000 from Wil-Bao's account to Utah's First Zions National Bank for Saren Gaowa's benefit. Gaowa was Yue's wife.

And, on October 18, 1996, Yue transferred $1 million from the Wil-Bao account to an account in another Chinese bank, the International Department of Industrial and Commercial Bank of China ("ICBC"), using these funds to purchase a certificate of deposit ("CD") that would mature in one year. Yue then used the CD as collateral to obtain five loans from the ICBC to Wil-Bao in a total amount of six million RMB. "While a portion of those loan proceeds may have been

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[9] The SAEC "is a government agency charged with the regulation of foreign exchange in China."

applied to the acquisition of a . . . mine and the lease of a high capacity mill, the actual disposition of those loan proceeds remains unknown."

In December 1996, Jones sent Yue written authorization to transfer $63,250 to ASC. In response, Yue sent Wilson a letter, written in broken English, indicating that there was no money in the Wil-Bao account to make this transfer if Wil-Bao was to start milling its ore. After receiving this message, Jones and Wilson travelled to China in February 1997. There, Jones tried to review the Wil-Bao books, but was unable to understand them because they were in Chinese. Yue did explain to Jones and Wilson that he had transferred some Wil-Bao funds to the ICBC bank in order to obtain several loans. Neither Wilson nor Jones contacted the Bank or the ICBC to investigate Yue's explanation further. Yue promised to send the Americans a "year-end financial statement" and otherwise "assured" Jones and Wilson "that everything was fine."

Jones and Wilson again traveled to China in June 1997, accompanied by Eck, Wilson's controller, Ken Schmick, and Gayla Zhang, who apparently speaks Chinese and has an accounting background. There, the group discovered that "Wil-Bao's ledgers [were] hopelessly out of balance and not up to date," and that the Wil-Bao accounts with the Bank contained only $21,000.

When confronted with this, Yue explained that he had transferred almost all of the Wil-Bao money to the ICBC. But no one at the ICBC would meet with the American contingent to verify this. Eventually, Yue

produced someone purportedly from the ICBC to assure the Americans that they had $1 million in the ICBC. This apparently satisfied the Americans, although Jones expressed some concern about Yue's being able to transfer all of Wil-Bao's money from the Bank to the ICBC without Jones' written authorization. But Jones did not check with the Bank about this.

Jones and Wilson, with Gayla Zhang, returned to China in October 1997. There, an ICBC official informed them that there were no Wil-Bao funds in the ICBC because Yue had used all of these funds as collateral for the loans he had obtained. Wilson then removed Yue as Wil-Bao's general manager, and Wilson and Gayla Zhang took over operating the joint venture. The Chinese government prosecuted Yue for embezzlement. He was convicted and sentenced to twelve years' imprisonment.

Orient Mineral and Wil-Bao sued the Bank, Yue and Gaowa in federal district court in Utah, asserting breach of contract and tort claims, and seeking to impose a constructive trust on Gaowa's home in Utah.[10] The Bank, in turn, asserted its immunity as a foreign sovereign. In addition, the Bank alleged a counterclaim based upon the language in Orient Mineral's May 16, 1996 board resolution promising to hold the Bank "harmless from all claims or liabilities of any kind whatsoever, provided the directions of

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[10] The district court eventually dismissed the claims against Yue because Plaintiffs were unable to serve him. And Plaintiffs settled their claims against Gaowa at the time of trial.

Preston Jones are followed by said Bank." The Bank expressly made its counterclaim contingent on the district court's finding it had jurisdiction to consider Plaintiffs' claims against the Bank.

Following a thirteen-day bench trial, the district court concluded it had subject matter jurisdiction over Plaintiffs' claims only to the extent they were based upon the $400,000 transfer to the Utah bank. The court found for the Bank on the merits of those claims. Plaintiffs appeal (No. 05-4037), challenging several aspects of that decision. The Bank cross-appeals (No. 05-4048), challenging only the district court's decision that it had subject matter over Plaintiffs' claims based upon the $400,000 transfer to the Utah bank.

After the trial, the district court dismissed the Bank's counterclaim with prejudice. The Bank appeals that decision in appeal No. 05-4220.

## II. APPELLATE JURISDICTION

As an initial matter, the parties challenge our jurisdiction to consider these appeals. We conclude we have appellate jurisdiction to consider all three of the appeals before us.

Following trial, the district court, on January 26, 2005, entered judgment in favor of the Bank on Plaintiffs' claims based upon the Bank's transferring $400,000 from Wil-Bao's account in Lingbao to the Utah bank; and dismissed the remainder of Plaintiffs' claims for lack of subject matter jurisdiction. Although the district court's decision did not expressly address the Bank's still-pending contingent counterclaim, the

district court, on January 27, entered judgment pursuant to Fed. R. Civ. P. 58(a), and ordered that the Bank recover its "costs" from Plaintiffs.[11] Treating the district court's decision as a final, appealable order under 28 U.S.C. § 1291,[12] Plaintiffs filed a notice of appeal within thirty days of the entry of judgment (appeal No. 05-4037), and the Bank filed a notice of cross-appeal within fourteen days of Plaintiffs' notice of appeal (appeal No. 05-4048).

In light of the fact that the district court's January 26, 2005 decision did not specifically resolve the Bank's still-pending counterclaim, this court raised concerns about our jurisdiction to consider the parties' cross-appeals, because "a judgment . . . that does not dispose of all claims is not considered a final appealable decision under § 1291," *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006). At this court's suggestion, the parties jointly requested that the district court enter a Fed. R. Civ. P. 54(b) certification permitting them to pursue their cross-appeals even though the district court's decision had not resolved all of the claims pending before it in

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[11] Fed. R. Civ. P. 52(a) provides that, following trial to the court, "judgment shall be entered pursuant to Rule 58." And Rule 58(a)(1) provides, in pertinent part, that "[e]very judgment . . . must be set forth on a separate document."

[12] 28 U.S.C. § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

this case.[13] In response to the parties' request, the district court instead dismissed the Bank's counterclaim, presumably with prejudice, indicating that the court had already "finally adjudicated the Bank's remaining counterclaim[]" when it previously entered judgment for the Bank on Plaintiffs' claims.[14]

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[13] Rule 54(b) permits the district court to "direct the entry of a final judgment as to one or more but *fewer than all* of the claims or parties" but "only upon an express determination [by the district court] that there is no just reason for delay and upon an express direction for the entry of judgment." (Emphasis added.) Rule 54(b) further provides that

> [i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[14] The district court did not specify whether its dismissal was with or without prejudice. The Tenth Circuit recognizes a "general rule [] that a party cannot obtain appellate jurisdiction where the district court has dismissed at least one claim *without prejudice* because the case has not been fully disposed of in the lower court." *Jackson*, 462 F.3d at 1238 (emphasis added). But here, it is clear that the district court intended to dismiss the Bank's contingent counterclaim with prejudice. In its decision expressly dismissing the Bank's counterclaim, the district court indicated that its earlier decision had in fact "finally adjudicated the Bank's remaining counterclaim[]," because the Bank's counterclaim was contingent on the court's imposing some liability on the Bank, and because the court's decision disposing of all of Plaintiffs' claims did not impose any liability on the Bank. *Cf. Styskal v. Weld County*

The district "court's subsequent issuance of an order explicitly adjudicating all remaining claims may cause a case to ripen for appellate review." Jackson, 462 F.3d at 1238 (quotation omitted). That is true here. *See Fed. Sav. & Loan Ins. Corp. v. Huff*, 851 F.2d 316, 317 (10th Cir. 1988) (en banc). We, therefore, have appellate jurisdiction to consider the parties' cross-appeals, Nos. 05-4037 and 05-4048.

In addition, the Bank, in appeal No. 05-4220, timely appealed from the district court's decision explicitly dismissing the Bank's contingent counterclaim and ending this litigation.[15] We, therefore, have appellate jurisdiction to consider that appeal as well. *See* 28 U.S.C. § 1291.

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*Bd. of County Comm'rs*, 365 F.3d 855, 858-59 (10th Cir. 2004) (noting dismissal without prejudice means dismissal without barring litigant from refiling; citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001)).

[15] Plaintiffs argue that the Bank's notice of appeal underlying this separate appeal, No. 05-4220, was untimely. They contend that, because the district court thought it was "finally adjudicating" the Bank's contingent counterclaim at the time the court entered judgment for the Bank on all of Plaintiffs' claims, in January 2005, the Bank should have filed its notice of appeal challenging the district court's (implicit) decision denying the Bank relief on its contingent counterclaim then. But the district court's earlier order did not explicitly address the Bank's counterclaim and so did not put the Bank on notice that it needed to file a notice of appeal at that time. Because the district court, in this case, did not explicitly dismiss the Bank's counterclaim until its order dated July 6, 2005, the Bank's notice of appeal filed within thirty days of that decision was timely. *See* Fed. R. App. P. 4(a)(1)(A).

## III. DISCUSSION

### A. CROSS-APPEALS: Nos. 05-4037 and 05-4048

#### 1. Whether, and to what extent, the district court had subject matter jurisdiction over Plaintiffs' claims against the Bank under the FSIA.

##### a. Standard of review

This court will review *de novo* the district court's determination of its subject matter jurisdiction under the FSIA, reviewing factual findings for clear error. *See Southway v. Cent. Bank of Nigeria*, 328 F.3d 1267, 1272 (10th Cir. 2003).

##### b. Background

For most of the time since the United States' inception, foreign sovereigns have enjoyed almost complete immunity from suit in American courts. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted a more "'restrictive' theory of foreign sovereign immunity." *Verlinden*, 461 U.S. at 486-87; *see also Altmann*, 541 U.S. at 689-90. Under this restrictive theory, foreign sovereigns still enjoyed immunity for public or sovereign acts, but they no longer had unqualified immunity for private or commercial activity. *See Verlinden*, 461 U.S. at 487; *see also* Altmann, 541 U.S. at 690; *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60

(1993). Congress codified this restrictive theory when it enacted the FSIA in 1976. *See Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2357 (2007).

The FSIA provides the sole source of American courts' subject matter jurisdiction over a foreign sovereign. *See Amerada Hess Shipping Co.*, 488 U.S. at 435, 439, 443; *see also Permanent Mission of India*, 127 S. Ct. at 2355; *Nelson*, 507 U.S. at 355. A foreign state is still presumptively immune from suit. *See* 28 U.S.C. § 1604; *see also Permanent Mission of India*, 127 S. Ct. at 2355; *Nelson*, 507 U.S. at 355. But the FSIA "carves out certain exceptions to its general grant of immunity." *Altmann,* 541 U.S. at 691. "These exceptions are central to the Act's functioning: 'At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application." *Id.* (quoting Verlinden, 461 U.S. at 493-94); *see also Amerada Hess* Shipping, 488 U.S. at 434-35.

In considering whether a foreign sovereign is immune from suit in the United States under the FSIA, courts employ a burden-shifting analysis. *See Southway*, 328 F.3d at 1271. The defendant must first establish a prima facie case that it is a sovereign state, creating a rebuttable presumption of immunity. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1062 (N.D. Cal. 2005). Once the foreign sovereign makes that prima facie showing of immunity, the plaintiff has the burden of production to make an initial showing that an FSIA exception to foreign immunity applies.

*See Southway*, 328 F.3d at 1271; *see also Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). If the plaintiff makes such a showing implicating an exception, then the foreign sovereign bears the "ultimate burden of proving," by a preponderance of the evidence, that the exception does not apply in that case. *Southway*, 328 F.3d at 1271.

**c. The FSIA's commercial activity exception**

In this case, Plaintiffs do not dispute that the Bank is an instrumentality of a foreign sovereign–the People's Republic of China.[16] *See also Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 890 (5th Cir. 1998) ("The Bank of China is an instrumentality of the People's Republic of China."). Therefore, the Bank has made a prima facie showing of immunity. *See Southway*, 328 F.3d at 1271.

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[16] In its appellate brief, the Bank asserts that, in 2004,

> the Government of China established Central Huijin Investment Company Limited and converted the Bank into a joint stock company owned by CHIC. The Bank then became the Bank of China Limited[.] In August 2005, ten percent of the shares of Bank of China Limited was sold to Royal Bank of Scotland, and in September 2005, another ten percent was sold to Temasek Holdings of Singapore.

These changes do not affect this litigation because "instrumentality status [is] determined at the time suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *see also Kirkham v. Societe Air France*, 429 F.3d 288, 290 (D.C. Cir. 2005).

Plaintiffs assert, however, that the FSIA's commercial activity exception, *see* 28 U.S.C. § 1605(a)(2), applies in this case to give United States courts subject matter jurisdiction. The "commercial activity" exception is the FSIA's "most significant . . . exception[]" to foreign sovereign immunity. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). It "is at the heart" of the FSIA's codification of the restrictive theory of foreign sovereign immunity. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 Chi. J. Int'l L. 675, 682 (Winter 2005); *see also Weltover*, 504 U.S. at 612-13.

In this case, the parties also do not dispute that the Bank is engaged in commercial activity. *See Voest-Alpine Trading*, 142 F.3d at 892 (parties did not dispute that "the Bank of China is a foreign state engaged in commercial activity"). Nevertheless, there must also be a sufficient nexus between the Bank's commercial activity and the United States: "For there to be jurisdiction in this case," therefore, Plaintiffs' "action must be 'based upon' some 'commercial activity' by [the Bank] that had 'substantial contact' with the United States within the meaning of the [FSIA]." *Nelson*, 507 U.S. at 356; *see also Morrissey*, *supra*, at 676-77, 683-84; William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. Mar. L. & Com. 257, 264 (1997).

The FSIA's "commercial activity exception is broken down into three clauses," each identifying a sufficient connection to the United States necessary "to

satisfy the jurisdictional nexus requirement." *Voest-Alpine Trading*, 142 F.3d at 892. The FSIA provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of any of the States in any case –
>
> . . .
>
> in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (numbering in brackets added). In this case, Plaintiffs assert that the district court has subject matter jurisdiction over their claims asserted against the Bank under all three clauses of the commercial activity exception.

In addressing whether a federal court has subject matter jurisdiction over Plaintiffs' claims, we must first identify "the particular conduct on which [Plaintiffs'] action is based." *Nelson*, 507 U.S. at 356 (quotation omitted). That is because, for FSIA purposes, the statutory phrase "based upon," 28 U.S.C. § 1605(a)(2), "is read most naturally to mean those elements of a claim that, if proven, would entitle a

plaintiff to relief under his theory of the case." Nelson, 507 U.S. at 357. Our focus, then, must be on the "specific claim[s]" that Plaintiffs assert against the Bank and the "elements of th[ose] claim[s] that, 'if proven, would entitle [Plaintiffs] to relief under [their] theory of the case.'" *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir. 2004) (quoting *Nelson*, 507 U.S. at 357).

In this case, although Plaintiffs asserted at least five different theories of recovery against the Bank, all of their claims are based on the Bank's alleged breach of a duty, created contractually or otherwise, 1) to keep safe the funds Orient Mineral wired to its temporary account in the Bank's Lingbao sub-branch, and to disburse those funds only according to Jones' directions; and 2) to require Jones' authorization for any withdrawals from Wil-Bao's accounts in an amount greater than $25,000.[17]

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[17] Plaintiffs specifically alleged the following claims against the Bank: 1) The Bank fraudulently misrepresented to Plaintiffs that it would a) keep Orient Mineral's funds safe in Orient Mineral's temporary account in the Bank's Lingbao sub-branch and disburse those funds only according to Jones' directions; and b) require Jones' authorization for withdrawals from Wil-Bao's accounts in amounts greater than $25,000. 2) The Bank breached two contracts it had with Plaintiffs: a) The Bank, in its May 14, 1996 letter, agreed to keep safe Orient Mineral's funds wired to its temporary account in the Bank's Lingbao sub-branch and to disburse those funds according to Jones' directions. And, b) on May 27, 1996, the Bank entered into an account agreement with Wil-Bao which required Jones' authorization for withdrawals in amounts greater than $25,000. 3) The Bank owed Orient Mineral and Wil-Bao, as its customers, duties to exercise care in opening

### i. Whether Plaintiffs' claims are "based upon" the Bank's "commercial activity carried on in the United States"

Section 1605(a)(2)'s first clause applies when the "the action is based upon a commercial activity carried on in the United States by the foreign state." "'[C]ommercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The phrase "'commercial activity carried on in the United States' means commercial activity carried on by [a foreign] state and having substantial contact with the United States." *Id.* § 1603(e).

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and handling their accounts; to understand and follow its customers' instructions; to be alert to suspicious circumstances; and to prevent fraud. The Bank was negligent when it breached these duties by permitting Yue to make withdrawals from the Wil-Bao accounts in amounts greater than $25,000 without Jones' authorization. 4) The Bank conspired with Yue, Gaowa and others to commit fraud against Plaintiffs by a) falsely asserting, in its May 14, 1996 letter, that it would keep Orient Mineral's money safe; and b) "staging" the May 27 meeting between officials from Orient Mineral, Wil-Bao and the Bank, during which the group created the Wil-Bao accounts. 5) The Bank negligently misrepresented to Plaintiffs, a) in its May 14, 1996 letter, that it would keep safe Orient Mineral's money, wired to its temporary account in the Bank's Lingbao sub-branch; and b) failed to advise Plaintiffs' representatives, during the May 27, 1996 meeting at the Lingbao sub-branch, that the Bank would not follow Plaintiffs' instructions requiring that withdrawals of more than $25,000 from Wil-Bao's accounts have Jones' authorization.

Plaintiffs assert several ways in which the Bank carries on commercial activity in the United States. First, the Bank drafted a letter, dated May 14, 1996, promising to keep safe the funds Orient Mineral wired to its temporary account in the Bank's Lingbao sub-branch until Orient Mineral's representative, Jones, arrived in China. With this letter, according to Plaintiffs, the Bank established an ongoing business relationship with Orient Mineral.

But the evidence established that it was Yue, a director of Orient Mineral and Wil-Bao's manager, who made arrangements with the Bank, in China, for Orient Mineral to wire $3 million into a temporary account in the Bank's Lingbao sub-branch. At Wilson's direction, Yue, in making these arrangements, requested that the Bank draft a letter that would include account routing instructions and a promise to keep Orient Mineral's funds safe until Orient Mineral's representative, Jones, arrived in China. The Bank provided Yue with such a letter, dated May 14, 1996, written in Chinese and addressed to Yue. It was Yue, not the Bank, who sent this letter to Wilson in the United States, along with a rough English explanation. Orient Mineral then responded to the Bank's letter with the Orient Mineral resolution making Jones its sole representative and agreeing to hold the Bank harmless if it followed Jones' directions. Eck also drafted a letter to the Bank reiterating these points. But Eck delivered these two Orient Mineral documents in person to the Bank's Lingbao sub-branch when Eck accompanied Jones to China. This series of

events can not be construed as the Bank's carrying on commercial activity *in the United States.*[18]

Plaintiffs next argue that the Bank carries on commercial activity in the United States by operating a branch Bank in New York City. We agree. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1105 (5th Cir. 1985) (noting foreign bank "regularly engaged in commercial activity in the United States," where, among other things, bank operated branch bank in Los Angeles). But "the fact that a foreign sovereign is engaged in commercial activity in the United States does not serve as a license for United States courts to entertain all claims against it." *Dorsey, supra*, at 294; *see also id.* at 296 (noting that "the test for jurisdiction under" the commercial activity exception's "first clause is something more than just a 'doing business' test,

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[18] Plaintiffs further allege that the Bank's May 14 letter represented an offer to create a contract with Orient Mineral, and that Orient Mineral accepted that contract when it wired $3 million from a Wachovia Bank account in the United States to the temporary account the Bank established for Orient Mineral in its Lingbao sub-branch. Thus, according to Plaintiffs, they created this contract in the United States. The district court agreed.

Even so, the Bank's actions in this regard are insufficient to establish that the Bank was carrying on commercial activity *in the United States.* The Bank did not take any actions in the United States to negotiate the contract. Rather, it negotiated the arrangements for Orient Mineral's temporary account in China with only Yue, as a representative of Orient Mineral and Wil-Bao. It was Yue who forwarded the Bank's letter offering a contract to the United States. Further, the focus of this contract was centered in China, where it was to be performed.

that is, that the foreign sovereign can be sued in the United States . . . even though there is no specific connection between the lawsuit and the United States"). Rather, Plaintiffs' claims must be "based upon" that commercial activity. *See Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000); *see also Kirkham*, 429 F.3d at 293 (noting that "once a foreign state engages in a commercial activity in the United States, it becomes subject to litigation *based upon that activity*-just like any other commercial actor") (emphasis added).

Plaintiffs point to the fact that, when McKee transferred $3 million for Orient Mineral, from an American bank to Orient Mineral's temporary account in the Bank's Lingbao sub-branch, that wire transfer went through the Bank's New York branch. And when the Bank transferred Wil-Bao funds back to the United States, as Jones requested, those transfers also may have gone through the New York branch. These connections alone, however, are insufficient to establish subject matter jurisdiction under the first clause of the FSIA's commercial activity exception because none of Plaintiffs' claims against the Bank are "based upon" these particular transactions. *See Nelson*, 507 U.S. at 356-58[19]; *see also Goodman Holdings v.*

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[19] In *Nelson*, an American hired to work in a Saudi Arabian hospital complained to his supervisors about safety defects in the hospital's oxygen and nitrous oxide lines. *See* 507 U.S. at 351-52. The plaintiffs (the employee and his wife) alleged that, because he complained, Saudi police officers arrested and tortured the American employee. *See id.* at 352-53. The plaintiffs sued several Saudi instrumentalities alleging tort claims, including failure to

*Rafidain Bank*, 26 F.3d 1143, 1144-46 (D.C. Cir. 1994) (rejecting argument that there was a sufficient nexus between the Iraqi government bank's commercial activity carried on in the United States and claim asserted against the bank by several Irish companies, alleging that the bank had failed to make payments under a letter of credit, even though the bank had made previous payments from accounts the Iraqi bank had in the United States); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1382-84 (8th Cir. 1993) (holding that the fact that defendant operated airline that served destinations in the United States did not provide United States courts with subject matter jurisdiction over claims against the defendant that were not based upon its operation of the airline, but were instead based upon the defendant's negotiations to purchase another airline, where negotiations took place "primarily" outside the United States); *Wahba v. Nat'l Bank of Egypt*, 457 F. Supp. 2d 721, 735 (E.D. Tex. 2006) (holding National Bank of Egypt's specific

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warn the employee of such dangers stemming from his employment by a Saudi hospital. *See id.* at 353-54. The plaintiffs asserted that the FSIA's commercial activity exception's first clause provided American courts with subject matter jurisdiction over their claims asserted against the Saudi government. *See id.* at 356. The Supreme Court disagreed, *see id.* at 363, holding that, although Saudi Arabia had arguably engaged in commercial activity in the United States when it recruited and hired the employee to work in a Saudi hospital, the plaintiffs' claims were not based upon that particular commercial activity or the resulting employment contract. *See id.* at 351-54, 358-59. Rather, the plaintiffs' claims were instead based upon Saudi Arabia's allegedly tortious conduct, which was not commercial but instead sovereign activity–the exercise of police power. *See id.* at 358-63.

commercial activity implicated by plaintiffs' claims was financing plaintiffs' businesses in Egypt; the Bank's contact with the United States regarding these particular transactions was only "sporadic"; and, therefore, plaintiffs' claims were not "based on" the Bank's commercial activity in the United States).

Plaintiffs further argue that the Bank's transfer of $400,000 of Wil-Bao's funds to the bank in Utah amounts to the Bank's carrying on commercial activity in the United States. We later conclude that this activity was sufficient to subject the Bank to jurisdiction for this particular act under the third clause of § 1605(a)(2). However, we do not believe this single act constitutes "commercial activity carried on in the United States" by the Bank under the first clause of § 1605(a)(2). The Bank acted within China, not the United States. The consequence of the act was felt in the United States when the Utah bank received the funds but the Utah bank was not acting as an agent of the Bank. Rather, it was acting as an independent, arms-length entity in an ordinary commercial transaction. So, the Utah bank's act in the United States cannot be attributed to the Bank.

For these reasons, Plaintiffs have failed to assert sufficient evidence establishing that their action is "based upon" the Bank's commercial activity "carried on in the United States." The district court, therefore, did not have subject matter jurisdiction over Plaintiffs' claims based upon the commercial activity exception's first clause.

**ii. Whether Plaintiffs' claims are based upon "an act" the Bank "performed in the United States in connection with" the Bank's "commercial activity . . . elsewhere."**

Section 1605(a)(2)'s second clause applies when "the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." Under this clause, a "material connection must exist between the act performed in the United States and plaintiff's cause of action." *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998); *see also Grossman*, 991 F.2d at 1384; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 (9th Cir. 1992).

In invoking the second clause of the FSIA's commercial activity exception, Plaintiffs rely on the same Bank conduct that Plaintiffs asserted to invoke § 1605(a)(2)'s first clause. For the same reasons stated above, however, Plaintiffs here have failed to establish that their claims are based upon any action the Bank took in the United States. *See Pere*, 150 F.3d at 482; *Grossman*, 991 F.2d at 1384.

**iii. Whether Plaintiffs' claims are based upon an act the Bank took outside the United States that "cause[d] a direct effect in the United States."**

The commercial activity exception's third clause provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The district court in this case held that it had jurisdiction under the third clause to consider *only* Plaintiffs' claims that are based upon the Bank's transferring $400,000 to the Utah bank. We agree.

Although it is clear that the Bank was carrying on commercial activity in China, we must consider here what specific acts the Bank took in China that underlie Plaintiffs' claims. On appeal, Plaintiffs rely primarily on the Bank's conduct in transferring, at Yue's request, $400,000 from Wil-Bao's account in the Bank's Lingbao sub-branch.[20] We address that Bank act first. The Bank's transferring this $400,000 out of Wil-Bao's account was certainly connected with the Bank's commercial activity in China. The dispositive question here, then, is whether this Bank conduct, taken in China, had a direct effect in the United States.

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[20] The Bank acknowledges that "[a]ll of the acts of the Bank at issue here–including its receipt and review of Wil-Bao's transfer request, consultation with the SAEC, and execution of the transfer of $400,000 out of Wil-Bao's U.S. dollar account–were performed in China."

A "direct effect" need not be substantial or foreseeable, but it must be more than trivial. *See Weltover*, 504 U.S. at 617-18. And it will be sufficiently "'direct' if it follows as an immediate consequence of the defendant's activity." *Id.* at 618 (quotation, alteration omitted).[21] Applying that reasoning to this case, it is clear that the Bank's transfer of $400,000 of Wil-Bao's funds from its account in the Bank's Lingbao sub-branch to the Utah bank had a direct effect in the United States–the Utah bank received $400,000 on Gaowa's behalf. This "follow[ed] as an immediate consequence" of the Bank's alleged wrongful conduct in permitting Yue to withdraw $400,000 from Wil-Bao's account without Jones' authorization and to direct those funds be transferred to Utah.[22]

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[21] In *Weltover*, the Argentine government issued bonds that provided, among other things, that Argentina would pay interest and principal due on those bonds in United States dollars through a transfer on the London, Frankfurt, Zurich or New York market, at the creditor's election. *See* 504 U.S. at 609-10. Argentina defaulted on those bonds. *See id.* at 610. Two creditors who had specifically requested that Argentina pay them in New York sued Argentina for breach of contract in a New York federal court. *See id.* The Supreme Court adopted the Second Circuit's definition of a "direct effect" as one that "follows as an immediate consequence of the defendant's activity." *Id.* at 618 (quotation, alteration omitted). The Court had "little difficulty concluding that Argentina's [breach] had a 'direct effect' in the United States" – "[m]oney that was supposed to be delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

[22] Contrast *Weltover* and this case with the Tenth Circuit's decision in *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n*, where this court held that the plaintiffs had *not* established that any direct effect had occurred in the United

The Bank suggests that the "direct effect" occurring in the United States must be "legally significant" in order for an American court to have subject matter jurisdiction under the commercial activity exception's third clause. There are courts that have adopted a "legally significant act" test when applying § 1605(a)(2)'s third clause. *See Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 240 (2d Cir. 2002); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 726-27 (9th Cir. 1997). But this test is defined in different ways. Some courts require that the direct effect occurring in the United States be a direct effect caused by legally significant conduct

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States. *See* 33 F.3d 1232, 1234, 1237 (10th Cir. 1994). In *United World Trade,* a Colorado corporation (United World Trade, or "UWT") entered into several agreements in Kazakhstan and Moscow with entities affiliated with the Kazakh government that involved UWT arranging for purchasers for Kazakh oil. *See id.* at 1234-35 & 1234 n.2. Although these agreements were to be performed in their entirety outside the United States, *see id.* at 1235-36, 1238, UWT asserted that Kazakhstan's refusal to make all the oil shipments required under these agreements had a direct effect in the United States because: Kazakhstan was to pay UWT in United States dollars, which would have required some United States bank to become involved at some point in the payment process, *see id.* at 1236-37; UWT incurred expenses and potential liability in the United States when it agreed to indemnify one of the oil buyers after Kazakhstan lost the bill of lading for one of its oil shipments, *see id.* at 1238; and UWT lost profits in the United States when Kazakhstan breached its contract with UWT; *see id.* This court rejected all three of these theories as insufficient to establish that Kazakhstan's breaching its contract with UWT had any "direct effect" in the United States. *See id.* at 1237-38.

*outside* the United States. *See Virtual Countries*, 300 F.3d at 240. That test would be met here. The Bank's permitting Yue to withdraw $400,000 from Wil-Bao's account in Lingbao without Jones' authorization is certainly legally significant to Plaintiffs' claims. Other authority, however, defines the "legally significant act" test to require that a legally significant act occur *within* the United States. *See Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000); *see also Virtual Countries*, 300 F.3d at 241 (assuming there was a "legally significant direct effect"); *cf. Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 817-18 (6th Cir. 2002) (discussing, but declining to adopt, legally significant act test); *Voest-Alpine*, 142 F.3d at 894-95 (same).

This court has never adopted the "legally significant act" test, and we now explicitly reject that additional, judicially-created criteria to satisfy 28 U.S.C. § 1605(a)(2)'s third clause. In *United World Trade,* we recognized "that courts often look to the place where legally significant acts giving rise to the claim occurred in determining the place where a direct effect may be said to be located." 33 F.3d at 1239 (quotation omitted). In that case, this court was struggling to resolve the "amorphous . . . issue" of "locat[ing] the site of financial harm to a corporation, . . . where the cause of the injury is an omission." *Id.* There, we ultimately examined "all of the facts . . . together . . ., including the 'legally significant acts,'" before concluding that the conduct at issue in that case did not produce a direct effect in the United States. *Id.* We thus will consider the legally significant acts, as well as other relevant facts under the circumstances of a given case, to aid our determination. In doing so, we

look to where the legally significant acts occurred as simply one of several means to determine whether a direct effect occurred in the United States. *See Morrissey*, *supra*, at 688 (making this observation). In *United World Trade,* we did not make legally significant acts in the United States a prerequisite for jurisdiction under the third clause of 28 U.S.C. § 1605(a)(2).

We reject engrafting this additional requirement necessary to satisfy § 1605(a)(2)'s third clause for many reasons. First, the statute's text does not require it. *See Voest-Alpine*, 142 F.3d at 894; *see also Keller*, 277 F.3d at 818. And the Supreme Court has counseled against adding extra-legislative requirements to statutory text. *See Weltover*, 504 U.S. at 618 (rejecting suggestion that § 1605(a)(2) contains "unexpressed requirement[s]"). Second, requiring legally significant acts to occur in the United States would render the second and third clauses of § 1605(a)(2) redundant, as any legally significant act occurring in the United States would likely also satisfy at least the second clause (a foreign sovereign's act in the United States), if not also the first clause (a foreign sovereign's commercial activity carried on in the United States). *See Voest-Alpine*, 142 F.3d at 895; *see also Morrissey*, *supra*, at 677 (noting that the commercial activity exception's first and second clauses address "[s]uits based on actions that actually occur in the United States"). Third, the phrase "legally significant act" is vague and ambiguous, adding nothing to the analysis. Thus, we will simply apply the third clause of § 1605(a)(2) as it is written, without judicial adornment.

In this case, it is clear that the Bank's commercial activity in China produced a "direct effect" in the United States–the transfer of $400,000 to a Utah bank. This case is unlike the circumstances addressed by this court in *United World Trade,* where the plaintiff alleged a direct effect resulting from the defendants' omission or failure to act, and the effect was only a loss of corporate profit in the United States, which we held was not a sufficient direct effect. *See United World Trade*, 33 F.3d at 1236-39. Here, instead, the Bank took affirmative action that caused an effect in the United States–money was received in the United States. And that effect was direct, that is, it followed as "an immediate consequence" of the Bank's permitting Yue to withdraw more than $400,000 from Wil-Bao's Chinese bank account without Jones' authorization, *Weltover*, 504 U.S. at 618 (quotation omitted), which was the essence of at least one of Plaintiffs' legal claims. For these reasons, the district court correctly held that it had subject matter jurisdiction over Plaintiffs' claims to the extent they were based upon the Bank's transferring $400,000 from Wil-Bao's account to Saren Gaowa's account in a bank in Utah.

On appeal, Plaintiffs also point to the Bank's conduct of drafting its May 14, 1996 letter as an act taken in China, in connection with the Bank's commercial activity there, that had a direct effect in the United States. Because, again, it is clear that this act underlies Plaintiffs' claims, occurred in China and is connected with the Bank's commercial activity in China, the relevant inquiry here is whether that act caused a direct effect in the United States. Under the specific facts of this case, we conclude it did not.

Plaintiffs assert that the Bank's May 14 letter induced them into wiring Orient Mineral's funds to the Bank's Lingbao sub-Branch. But the Bank wrote this letter at Yue's request, pursuant to the terms Yue requested. And Yue requested these terms at Wilson's insistence. Further, the Bank addressed the letter to Yue, who was Wil-Bao's general manager and a director of Orient Mineral, wrote the letter in Chinese and gave it to Yue in China. It was Yue who sent the Bank's letter to Wilson in the United States, along with Yue's rough explanation in English. Under these circumstances, Orient Mineral's wiring $3 million to the Bank's Lingbao sub-branch was not "an immediate consequence" of the Bank's drafting this May 14 letter addressed and given to Yue in China. *Weltover*, 504 U.S. at 618 (quotation omitted). The effect the Bank's conduct had in the United States, therefore, was indirect, rather than direct. Orient Mineral's response to the Bank's letter was ultimately the result of Yue's unlawful course of conduct, which constitutes an intervening act not attributable to the Bank.

Plaintiffs also point to the Bank's thrice wiring funds from Wil-Bao's accounts in the Bank's Lingbao sub-branch to the United States through the Bank's New York branch. But Plaintiffs' claims are not based upon the two transfers to the United States that Jones' authorized. And we have already concluded that the Bank's unauthorized transfer of $400,000 to the Utah bank was an act taken in China, in connection with the Bank's commercial activity there, that had a direct effect in the United States. This Utah transfer, therefore, is the only Bank conduct that Plaintiffs rely upon that was taken outside the United States, in

connection with the Bank's commercial activity in China, that had a direct effect in the United States.[23]

Plaintiffs, nevertheless, assert that, because the district court had subject matter jurisdiction over Plaintiffs' claims, to the extent they were based upon this $400,000 transfer, that is sufficient to give the district court subject matter jurisdiction over all of Plaintiffs' claims, even those based upon conduct occurring entirely in China. We disagree.

We look first to the FSIA's text. *See Permanent Mission of India*, 127 S. Ct. at 2356. The FSIA specifically provides, in relevant part, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States *except* as provided in section 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (emphasis added). Thus, "a foreign sovereign is immune from suit in any civil action in any court of the United States unless, *and to the extent that,* one of the exceptions set forth in §§ 1605-1607 applies." David P. Stewart, Practising Law Inst., Litig. & Admin. Practice Course Handbook Series, Int'l Business Litig. & Arbitration, The Foreign Sovereign Immunities Act 139 (2006) (emphasis added). "[I]f the claim does not fall within one of the exceptions, federal

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[23] Plaintiffs also rely upon the Bank's failure to notify Jones, "in Tennessee," of these unauthorized transfers. But that omission, as alleged, occurred *in the United States,* and thus would not satisfy the third clause of § 1605(a)(2). Further, Plaintiffs have never alleged, and there was no evidence presented at trial, suggesting that the Bank had ever promised to notify Jones of any withdrawals from the Wil-Bao account.

courts lack subject matter jurisdiction." *Verlinden*, 461 U.S. at 489.

> The third clause of the commercial activity exception provides subject matter jurisdiction where "the action is based upon . . . an *act* [occurring] outside the territory of the United States" that has caused "a direct effect in the United States."

28 U.S.C. § 1605(a)(2) (emphasis added). By its very terms, then, § 1605(a)(2)'s third clause gives American courts subject matter jurisdiction over claims stemming from a specific "act" outside the United States that has a direct effect in the United States. In *Nelson,* the Supreme Court contrasted this language with the language in § 1605(a)(2)'s *first* clause, which refers instead to an action based upon a foreign sovereign's *commercial activity* carried on in the United States. *See* 507 U.S. at 357-58.[24] Thus, the district court correctly held in this case that it did not have subject matter jurisdiction over Plaintiffs' claims

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[24] For this reason, Plaintiffs' reliance on the Eighth Circuit's decision in *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002), is misplaced. In that case, the court was applying § 1605(a)(2)'s *first* clause, which bases an American court's subject matter jurisdiction on a foreign sovereign's commercial activity carried on in the United States. *See* 285 F.3d at 686. Because the plaintiff in that case was able to establish that an element of one of its claims involved the foreign sovereign's commercial activity in the United States, the Eighth Circuit held that the district court had subject matter over all of the plaintiff's claims. *See id.* at 682-84, 688. In fact, all of the claims in *BP Chemicals* constituted an integrated scheme of "commercial activity," even though they alleged separate acts.

that were not based upon the act of the Bank in transferring $400,000 from Wil-Bao's account in the Bank's Lingbao sub-branch to a Utah bank.

**c. Conclusion.**

For these reasons, we AFFIRM the district court's determination that it had subject matter jurisdiction to consider the merits of Plaintiffs' claims, but only to the extent that they were based upon the $400,000 transfer from Wil-Bao's account in Lingbao to the First Zion's National Bank in Utah.[25]

**2. Whether the district court erred in ruling for the Bank on the merits of Plaintiffs' claims that were based upon the Bank's transferring $400,000 from Wil-Bao's account to a bank in Utah.**

**a. Standard of review**

This court will review the district court's factual findings, made after a bench trial, for clear error; and its legal conclusions *de novo*. *See Holdeman v. Devine,*

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[25] In light of this conclusion, we need not address Plaintiffs' argument that the district court abused its discretion in limiting pretrial discovery to facts relevant only to this $400,000 transfer. To the extent that Plaintiffs are instead arguing that the district court denied them discovery on matters pertinent to their claims based upon the $400,000 transfer to Utah, the district court did not abuse its discretion in doing so. *See Santana v. City & County of Denver*, 488 F.3d 860, 867 (10th Cir. 2007) (noting this court reviews discovery rulings for an abuse of discretion).

474 F.3d 770, 775 (10th Cir. 2007); *see also* Fed. R. Civ. P. 52(a).

**b. Choice of law**

The FSIA does not itself provide the substantive law governing a plaintiff's claims asserted against a foreign sovereign. *See* Cruz, 387 F. Supp. 2d at 1070-71. Rather, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," except that the foreign sovereign will not be liable for punitive damages. 28 U.S.C. § 1606.[26] In this case, the parties and the district court primarily applied Utah law in addressing Plaintiffs' claims. On appeal, Plaintiffs do not contest the district court's doing so. Thus, we too will apply Utah law, although it is far from clear that would be our conclusion if we conducted a proper

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[26] Section 1606 provides, in full, that,

> [a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

choice-of-law analysis. *See Flying J Inc. v. Comdata Network*, Inc., 405 F.3d 821, 831 n. 4 (10th Cir. 2005) (applying state law upon which the parties agree).

### c. Merits

#### i. Overview

As explained in greater detail below, the theory of recovery underlying most of Plaintiffs' claims is that the Bank breached its duty to follow Jones' directions in disbursing the $3 million in Orient Mineral's temporary account in the Bank's Lingbao sub-branch. Although Jones sought to maintain control over these funds by requiring his authorization before Yue could withdraw more than $25,000 from the Wil-Bao U.S. dollar account, Jones trusted Yue to convey this restriction to the Bank. Plaintiffs' claims fail primarily because there is no evidence that Yue ever actually conveyed Jones' requested restriction to the Bank. Believing, wrongly, that this $25,000 restriction was in place, Jones transferred Orient Mineral's money into the Wil-Bao accounts. Because the $25,000 restriction Jones sought to place on the Wil-Bao accounts was never shown to have been conveyed to the Bank, the Bank is not liable for Yue's misappropriating Wil-Bao's funds. Plaintiffs' contention that the circumstances surrounding their dealings with the Bank should have put the Bank on notice that Jones sought to restrict Yue's access to Wil-Bao's funds is unavailing. With this in mind, we turn to Plaintiffs' specific arguments asserted on appeal.

**ii. Breach of contract.**

Plaintiffs alleged that the Bank, in its May 14, 1996 letter, agreed to keep safe the funds Orient Mineral transferred into its temporary account with the Bank, and further agreed to follow the instructions of Orient Mineral's representative for disbursing those funds. Plaintiffs further alleged that the Bank breached this agreement when it transferred Orient Mineral's money from its temporary account into the newly created Wil-Bao U.S. dollar account without restricting Yue's access to those funds; and further breached this contract when the Bank permitted Yue to make withdrawals in excess of $25,000 from Wil-Bao accounts without Jones' authorization.

On appeal, Plaintiffs challenge the district court's determination that

> Plaintiffs' claim for breach of contract . . . fail[s]. First, the Bank of China performed according to the terms of its agreement with Orient Mineral: the Bank received Orient Mineral's wire transfer, held its funds awaiting Mr. Jones' arrival in China, and then followed Jones' direction to transfer those funds into Wil-Bao's account. The contract between Orient Mineral and the Bank did not address the terms of the contract to be formed between the Wil-Bao joint venture and the Bank.
>
> Wil-Bao formed its own contract with the Bank of China governing its accounts at the Bank. The terms of that contract did not include a US $25,000 restriction on withdrawals,

> transfers or remittances from Wil-Bao's U.S. dollar account, or any requirement that the Bank contact Jones to obtain approval to process transactions in the Wil-Bao accounts. Consequently, the processing of the US $400,000 transfer on or about August 28, 1996 without Jones' approval did not breach Wil-Bao's contract with the Bank.

(Footnote omitted.)

To the extent Plaintiffs are challenging the district court's interpretation of the parties' agreements, we review those legal determinations *de novo, see Interwest Constr. v. Palmer*, 923 P.2d 1350, 1358-59 (Utah 1996), and agree with the district court's construction of the contracts at issue here. To the extent Plaintiffs are challenging the district court's factual findings, we reject those arguments because the trial record fully supports the district court's determination.

Plaintiffs specifically argue that their giving the May 24, 1996 Wil-Bao resolution to Bank officials notified the Bank that Jones wanted to place a $25,000 restriction on Yue's access to the funds in the Wil-Bao U.S. dollar account. That resolution acknowledged McKee's investment in Wil-Bao, agreed to repay McKee in full before distributing any profits, and agreed to pay McKee an annual bonus of $333,333.33 for the next three years. The resolution went on to "further resolve[] that until all said sums are repaid in full Preston Jones shall be appointed as the director of Wil Bao responsible for the management of the financial affairs of Wil Bao with sole authority to

approve any expenditures of Wil Bao in excess of $25,000 US dollars."

The testimony at trial was conflicting as to whether Plaintiffs ever gave the Wil-Bao resolution to Bank officials and, if so, when. The district court found that it was "[m]ore likely than not, [that] the May 24th Wil-Bao board resolution was presented to [the Bank's] Mr. Wang at the May *29th* meeting at the Lingbao Sub-branch of the Bank of China."[27] That factual finding is not clearly erroneous. *See Watson v. United States*, 485 F.3d 1100, 1108 (10th Cir. 2007).

Because the parties created Wil-Bao's accounts on May 27, 1996, the terms of the Wil-Bao resolution, therefore, could not have been incorporated into the terms that governed the Wil-Bao account. Nor could the Bank, in creating the Wil-Bao accounts, have disregarded a resolution that the Bank had not yet received.

Further, Plaintiffs' act of giving the Wil-Bao resolution to a Bank official on May 29 was not

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[27] The Bank did not require any board resolution from Wil-Bao to open the Wil-Bao accounts on May 27, 1996. Nevertheless, Jones testified that he had Eck give the Bank officials the Wil-Bao resolution during the May 27 meeting. Wilson testified both that Eck gave the Wil-Bao resolution to Bank officials during the May 27 meeting, and that this occurred instead during the May 29 meeting. Madame Liu, a Bank official who attended the May 27 meeting, and Mr. Wang, another Bank official who attended both the May 27 and May 29 meetings, testified that they do not recall ever seeing the Wil-Bao resolution, at least not until this litigation.

sufficient to put the Bank on notice that Wil-Bao wanted additional restrictions placed on its accounts. The Wil-Bao resolution was not addressed to the Bank and was not accompanied by any indicia of an official directive, such as a corporate seal or a letter from Wil-Bao's officers. Even Plaintiffs, in their post-trial arguments before the district court, refer to this resolution as only an "internal" document. Moreover, although the resolution required Jones' authorization for "any expenditures of Wil-Bao," the resolution did not specifically link that restriction to the Bank or Wil-Bao's accounts with the Bank.

Plaintiffs also point to the note signed by Jones and Yue authorizing Yue to expend $1.2 million. Jones gave Bank official Wang this note during the May 29 meeting. Plaintiffs assert that this note also should have put the Bank on notice that Jones wanted a $25,000 restriction on Wil-Bao account expenditures. That note, however, handwritten on a piece of paper torn from a notebook, was not addressed to the Bank and did not clearly indicate it was to be any sort of authorization for the *Bank* to take some action. That note, therefore, would not have put the Bank on notice that Wil-Bao wanted a $25,000 restriction placed on its accounts with the Bank.

For these reasons, the district court did not err in entering judgment for the Bank on Plaintiffs' breach-of-contract claim.

### iii. Negligence

Plaintiffs also alleged that the Bank was negligent in permitting Yue to misappropriate Wil-Bao's funds.

Under Utah law, "[t]o establish a claim of negligence, the plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." *Webb v. Univ. of Utah*, 125 P.3d 906, 909 (Utah 2005) (quotation omitted).

Plaintiffs specifically alleged that the Bank

> owes duties to its depositors to exercise due care in opening and handling of its accounts. Said duties include the exercise of reasonable care to understand and follow the instructions of its customers on account opening, to be alert to suspicious circumstances and fraud in opening and operating accounts, and to prevent fraudulent or unauthorized transfers from said accounts.[28]

(Footnote added.) Plaintiffs further alleged that the Bank breached these duties owed to Plaintiffs by

> (1) failing to follow directions given by Preston Jones as its sole and exclusive representative to maintain its suspense account or open a new Orient Mineral account, or alternatively to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and

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[28] On appeal, Plaintiffs also argue that the Bank's May 14 letter created additional duties the Bank owed Orient Mineral. But for the same reasons mentioned above, we conclude it did not.

control; (2) failing to be alert to suspicious circumstances and fraud on account opening and upon transfer of the full $3 million from the suspense account to the Wil-Bao USD account, relying on the interpretation of Yue, who would thereby possess exclusive control; (3) failing to take reasonable safeguards to prevent the unauthorized transfer of funds from the Wil-Bao USD account by Yue in light of the facts known at the Bank at the time of the transfers; and (4) failing to raise regulatory issues or restrictions that required that the transfer not be made, and that regulatory approval was required.

The district court determined that the Bank had not breached any duty owed to Orient Mineral. That determination was not in error.

### iv. Civil conspiracy to defraud Plaintiffs.

Plaintiffs alleged that the Bank conspired with Yue and Gaowa, among others, to defraud Plaintiffs. "To prove civil conspiracy, five elements must be shown: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof."[29] *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282,

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[29] As overt acts, Plaintiffs alleged, among other things, that the Bank's May 14, 1996 letter induced Orient Mineral to transfer $3 million to the Bank's Lingbao sub-branch; the conspirators

1290 n. 17 (Utah 1993) (quotation omitted). "Further, conspiracy to defraud requires proof of the underlying fraud." *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1271 (Utah 1998).

The district court determined that Plaintiffs had failed to prove *any* of these required elements. We agree. In particular, there was no evidence presented that the Bank entered into any agreement with the other alleged co-conspirators. Moreover, as we held above, there is no evidence that the Bank acted with the intent to defraud Plaintiffs.

**v. Fraud**

Plaintiffs also alleged that the Bank defrauded them by falsely representing, in the Bank's May 14, 1996 letter, that it would keep safe the funds Orient Mineral wired into its temporary account with the Bank, and would follow the instructions of Orient Mineral's representative.

> Under Utah law, to bring a claim sounding in fraud, a party must allege (1) that a

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"staged" the May 27 meeting at the Bank between Bank officials and Plaintiffs' representatives; the Bank's officials failed "to perform normal 'know-your-customer' due diligence" at the meeting, and failed to advise Plaintiffs' representatives "of or raise any regulatory issues or restrictions;" the Bank failed to follow Orient Mineral's and Wil-Bao's instructions; illegally opened and operated the Wil-Bao "USD foreign exchange account" in a manner that circumvented oversight by the Chinese government's SAEC; and engaged in "highly suspicious conduct inconsistent with professionalism."

> representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

*Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1066-67 (Utah 1996). Fraud must be shown by clear and convincing evidence. *See Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35, 43 (Utah 2003); *Kuhre v. Goodfellow*, 69 P.3d 286, 291 (Utah Ct. App. 2003).

The district court held that Plaintiffs had failed to establish the elements necessary to prove fraud by clear and convincing evidence. We agree. In particular, the record does not show that the Bank knowingly made any false representations of material facts.

**vi. Negligent misrepresentation**

Finally, Plaintiffs alleged that the Bank negligently misrepresented to Orient Mineral that it would keep safe Orient Mineral's funds, transferred into a temporary account with the Bank, and would follow Orient Mineral's representative's instructions in disbursing those funds. Utah courts have held that "where one carelessly or negligently makes a false representation, expecting the other party to rely and act thereon, and the other party reasonably does so

and suffers a loss in that transaction, the representor can be held liable" for negligent misrepresentation. *Smith v. Frandsen*, 94 P.3d 919, 922-23 & 923 n. 1 (Utah 2004) (quotation, alterations omitted). The district court entered judgment for the Bank on this claim as well. It was not error to do so, for the same reasons discussed above.

**c. Conclusion**

The district court did not err in entering judgment for the Bank on Plaintiffs' claims based upon the Bank's transferring $400,000 to a bank in Utah. In light of this conclusion, we need not address Plaintiffs' assertions on appeal arguing that this court should either enter judgment in their favor or remand this case to a new judge.

**B. APPEAL NO. 05-4220**

In appeal No. 05-4220, the Bank challenges the district court's decision dismissing the Bank's contingent counterclaim. We review this legal determination *de novo*. *Cf. Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1267 (10th Cir. 2003) (reviewing *de novo* district court's determination as to whether counterclaim should be dismissed under Fed. R. Civ. P. 12(b)(6) for failing to state a claim on which relief can be granted).

The Bank's counterclaim, asserted against both Orient Mineral and Wil-Bao, was based upon Orient Mineral's resolution, dated May 16, 1996, which provided, in pertinent part: "BE IT FURTHER RESOLVED that the Board of Directors and Orient

Mineral Co. shall hold the Bank of China harmless from all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China."[30] The Bank alleged that it followed Jones' directions, as conveyed by Yue, when the Bank transferred the funds from Orient Mineral's temporary account into the Wil-Bao U.S. dollar account. Despite its following Jones' directions, Plaintiffs pursued this litigation, "subjecting the Bank to potential liability, costs of defense, (including litigation costs and attorneys' fees), and other injury." As relief, the Bank requested that Plaintiffs

> be held liable to the Bank for indemnification of the Bank and to hold the Bank harmless from all claims and liabilities of any kind whatsoever resulting from the Bank's actions in reliance upon the actual or apparent direction of Preston Jones to transfer funds to Wil-Bao Mineral Company Ltd. as represented by the transfer slip [that Jones signed], including but not limited to any liability in this action, the costs and expenses of this action (including the Bank's litigation costs, disbursements, and attorneys' fees).

The Bank made its counterclaim expressly contingent upon the district court's final determination adverse to the Bank on the Bank's affirmative

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[30] Although the Bank also originally named as counterclaim-defendants the individual members of both Plaintiffs' boards of directors, the district court dismissed those individuals without prejudice.

defenses based upon the FSIA, "including lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue." It did so in an effort to preserve its challenges to the district court's jurisdiction and the propriety of venue. The Bank further asserted that,

> in the event of such a final determination adverse to the Bank as to the Bank's aforementioned affirmative defenses based upon the [FSIA], . . . the Bank will at that time seek leave of the Court to further amend this Amended Answer in order to assert claims on behalf of the Bank against the counterclaim-defendants for claims and causes of action other than for indemnification, including at that time any claims the Bank may have for breach of contract, fraud, injury to the Bank's reputation, and other claims for the Bank's out-of-pocket loss, compensatory, consequential, and punitive damages, and other relief.
>
> At this time, however, the Bank asserts the following contingent . . . counterclaim solely for the indemnification of the Bank's liability and costs and expenses in this action (including its litigation costs and attorneys' fees) and, as [previously] stated . . . , solely predicated on a final determination adverse to the Bank of the Bank's aforementioned affirmative defenses based upon the [FSIA].

After trial, the district court determined that it had subject matter jurisdiction to consider the merits of Plaintiffs' claims, to the extent they are based upon

the Bank's transferring $400,000 from Wil-Bao's account to a bank in Utah.[31] The condition on which the Bank based its counterclaim had thus occurred. Nevertheless, after entering judgment for the Bank on Plaintiffs' claims stemming from the $400,000 transfer and dismissing the rest of Plaintiffs' claims for lack of subject matter jurisdiction, the district court also dismissed the Bank's counterclaim with prejudice.

In doing so, the court noted that, after it entered judgment for the Bank on Plaintiffs' claims, "[t]he Bank did not thereafter seek leave to amend the contingent counterclaim to add any additional claims against any party." That is true. But, while the Bank, in pleading its counterclaim, had left open the possibility that it might amend its answer to assert "claims and causes of action *other than for indemnification,*" the Bank also clearly pled its contingent counterclaim against Plaintiffs for indemnification for attorneys' fees.

The district court concluded that its decision awarding the Bank its costs, pursuant to Fed. R. Civ. P. 54(d)(1), "afforded relief concurrent with that sought by the Bank's counterclaim." We disagree. In this case,

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[31] Plaintiffs argue that the district court resolved the issue of subject matter jurisdiction prior to the trial. But the pretrial order specifically noted that the Bank contested the court's subject matter jurisdiction, and that one of the legal issues to be resolved *at trial* was whether the district court had "subject matter and personal jurisdiction over the Bank of China arising out of its wire transfer of $400,000 to the United States, *viz.*, to Zions First National Bank for the benefit of Saren Gaowa, on August 22, 1996."

the district court awarded the Bank a total of $22,577.44 in costs. That amount included court and witness fees, and costs for trial transcripts, depositions and copying. The court's award of costs did not include attorneys' fees, which the Bank specifically requested as relief in its counterclaim. The district court's award of costs thus did not award the Bank the full measure of relief it sought in its counterclaim.

It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the Bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys' fees, but that matter should be considered in the first instance by the district court.

We, therefore, remand that claim to the district court for consideration of the Bank's counterclaim for attorneys' fees. Although in their appeal No. 05-4037, Plaintiffs request that we vacate the district court's judgment entered in the Bank's favor and remand to a new judge, they do not make that same request in this appeal, No. 05-4220.

## IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's determination that it had subject matter jurisdiction to consider Plaintiffs' claims to the extent

they were based upon the Bank's transferring $400,000 to a bank in Utah, and that the court lacked jurisdiction to consider Plaintiffs' other claims asserted against the Bank. We also AFFIRM the district court's judgment in the Bank's favor on the merits of the claims involving that $400,000 transfer to Utah. But we REVERSE the district court's dismissal of the Bank's counterclaim and REMAND that claim to the district court for further proceedings consistent with this opinion.

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**Nos. 05-4037, 05-4048, 05-4220**
**D.C. No. 2:98-CV-238-BSJ**

**[Filed October 24, 2007]**

| | |
|---|---|
| ORIENT MINERAL COMPANY, a Nevada corporation; WIL-BAO MINERAL CO., a limited liability company formed under the laws of the People's Republic of China, Plaintiffs-Appellants, Cross-Appellees, | ) |
| v. | ) |
| BANK OF CHINA, a foreign banking institution doing business in the United States, Defendant-Appellee, Cross-Appellant. | ) |

**JUDGMENT**

Before KELLY, and EBEL, Circuit Judges, and MURGUIA*

* Honorable Carlos Murguia, District Judge of the District of Kansas sitting by designation.

These case originated in the District of Utah and were argued by counsel.

The judgment of that court is affirmed in part and reversed in part. The cases are remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

## APPENDIX B

**IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

**Civil No. 2:98-CV-238J**

**[Filed January 27, 2005]**

| | |
|---|---|
| ORIENT MINERAL COMPANY, and WIL-BAO MINERAL CO., LTD., | ) |
| Plaintiffs, | ) |
| v. | ) |
| BANK OF CHINA, DAVID YUE aka YIAOQUN YUE, and SAREN GAOWA, | ) |
| Defendants. | ) |

**JUDGMENT (Fed. R. Civ. P. 58(a)) & ORDER OF DISMISSAL (28 U.S.C. § 1604)**

The above-captioned action came on for trial before this court sitting without a jury on April 7-9, 12-16, and 19-23, 2004, and the issues having been duly tried, and the court having made and entered Findings of

Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a) on January 27, 2004,

**IT IS ORDERED AND ADJUDGED**

That the Plaintiffs ORIENT MINERAL COMPANY, and WIL-BAO MINERAL Co., LTD. take nothing, that the action be dismissed on the merits as to any claim based upon the wire transfer of $400,000 by the Bank of China in Lingbao, Henan Province, People's Republic of China, to Zions First National Bank in Sandy, Utah, within the District of Utah, on or about the 28th day of August, 1996; that the remainder of the Plaintiffs' action be dismissed for lack of jurisdiction pursuant to 28 U.S.C. § 1604 (2000); and that the Defendant BANK of CHINA recover of the Plaintiffs ORIENT MINERAL COMPANY, and WIL-BAO MINERAL CO., LTD., its costs of action.

DATED this 27 day of January, 2005.

BY THE COURT:

/s/
BRUCE S. JENKINS
United States Senior District Judge

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

**Civil No. 2:98-CV-238J**

**[Filed January 26, 2005]**

| | |
|---|---|
| ORIENT MINERAL COMPANY, and WIL-BAO MINERAL CO., LTD., | ) |
| Plaintiffs, | ) |
| v. | ) |
| BANK OF CHINA, DAVID YUE aka YIAOQUN YUE, and SAREN GAOWA, | ) |
| Defendants. | ) |

**FINDINGS OF FACT & CONCLUSIONS OF LAW (Fed. R. Civ. P. 52(a)) & ORDER RE: PENDING MOTIONS**

FINDINGS OF FACT: THE WIL-BAO JOINT VENTURE . . . . . 2

Formation of Orient Mineral and Wil-Bao . . . . 7

Soliciting Investment from McKee ..... 12
Meeting at the Bank on May 27, 1996 ..... 28
Meetings in Sanmenxia on May 28, 1996 ..... 42
Meeting at the Bank on May 29, 996 ..... 44
Disbursements from the Wil-Bao U.S. Dollar Account ..... 46
The July 10, 996 Jones Authorization Letter . 49
The August 1, 1996 US$ 135,000 Transfer .. 52
The August 28, 1996 US$ 400,000 Transfer to Saren Gaowa ..... 54
The October 17, 1996 Jones Authorization Letter ..... 57
The October 18, 1996 US$ 1 Million Transfer 58
The December 23, 1996 Jones Authorization Letter ..... 59
The January 23, 1997 US$ 63,250 Transfer . 60
The May 8, 1997 US$ 100,000 Transfer ..... 62
The Gathering Storm: Wil-Bao & Yue ..... 62
February 1997: Wilson and Jones go to China 62
The April 23, 1997 Jones Letter ..... 64

* * *

[p. 180]

Wil-Bao's attempted acquisition of the two "rich" mine properties with the testimony and exhibits offered to support those claims. Whether Wil-Bao could have completed the acquisition of the Linshikeng Mine or the Moshiyu Mine—or both mines, as Plaintiffs now contend—but for the misappropriations of Wil-Bao's general manager and director, Yue Xiaoqun, proves to be a question incapable of determination to any reasonable degree of certainty based upon the evidence presented by the Plaintiffs.

## CONCLUSIONS OF LAW

### Jurisdiction & the Foreign Sovereign Immunities Act

1. Plaintiffs invoked the district court's jurisdiction over the Bank of China pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1391(f), 1441(d) and 1602-1611 (2000) ("FSIA"). Venue is proper in the District of Utah pursuant to 28 U.S.C. § 1391 (2000). The Bank of China has disputed the exercise of this court's subject matter and personal jurisdiction over any of Plaintiffs' claims alleged against the Bank.

2. It is uncontroverted that as "an instrumentality of a foreign state" (the People's Republic of China), the Bank of China is a "foreign state" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a), (b) (2000).[186]

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[186] The Bank of China is a corporation organized under the laws of the People's Republic of China and that the People's Republic of China owns all of the Bank's stock. Thus the Bank of China exists as a "separate legal person, corporate" in nature, ""all majority of whose shares . . . is owned by a foreign state" and "which is neither a citizen of a State of the United States as defined in section 1332(c) and (d)" of Title 28, nor "created under the laws of any third country." 28 U.S.C.A. § 1603(b). As such, the Bank of China thus constitutes an "agency or instrumentality of a foreign state" and is deemed to be a "foreign state" for purposes of the FSIA and its "commercial activity" exception. 28 U.S.C.A. § 1603(a), (b). *See Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 890 (5th Cir. 1998) ("The Bank of China is an instrumentality of the People's Republic of China.")

[p. 181]

3. The FSIA "sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues raised in federal and state courts." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state" or its instrumentalities in the federal courts. *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n*, 33 F.3d 1232, 1236 (10th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995) (quoting *Argentine Republic v. Amarada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)).

4. In general, the FSIA grants immunity from suit in United States courts to foreign states and corporations owned by foreign states for acts taken pursuant to their sovereign power even though these acts impact the United States. "Under the FSIA, foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the FSIA's exceptions applies." *Holden v. Canadian Consulate*, 92 F.3d 918, 920 (9th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

5. Under FSIA's "commercial activity" exception, 28 U.S.C.A. § 1605(a)(2), however, "foreign states are not immune from federal jurisdiction for those actions taken that are similar to those of a private participant engaged in commerce." *Hanil Bank v.*

[p. 182]

*PT. Bank Negara Indonesia, (Persero)*, 148 F.3d 127, 129 (2d Cir. 1998). Section 1605(a)(2) reads:

> (a) A foreign state shall not be immune from the jurisdicion of the courts of the United States or of the States in any case—
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States inconnection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> * * * *

6. A foreign state engages in "commercial activity" when it exerciss "only those powers that can also be exercised by private citizens," in contrast to the exercise of those "powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). The FSIA's "commercial activity" exception applies only where a foreign sovereign acts "in the market in the manner of a private player." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

7. Plaintiffs asserted that the events and transactions at the Bank of China's Lingbao branch about which they now complain represent "commercial activity" carried on by the Bank of China in the United States, or acts "performed in the United States in connection with a commercial activity" in China, or at minimum, represent acts in China that "cause[d] a direct effect in the United States" within the meaning of the FSIA's

[p. 183]

"commercial activity" exception, 28 U.S.C.A. § 1605(a)(2). (*See* Tr. 4/23/04, at 146:12-150:5 (Mr. Ludwig); Plaintiffs' Bench Memorandum on FSIA Jurisdiction, dated June 17, 2004 (dkt. no. 335), at 2-8.) Plaintiffs thus assert FSIA jurisdiction over this case on all three bases set forth in § 1605(a)(2).

8. The Bank of China has responded that the pertinent transactions occurred in China and had no connection at all with the United States. According to Bank counsel, no contract between either Plaintiff and the Bank was performed or due to be performed in the United States. Nor was any "legally significant act"—that is, an act forming an element of Plaintiffs' claim—done by the Bank or required to be done by the Bank in the United States. With the exception of the $400,000 wire transfer on August 22, 1996, Bank counsel insisted that all of the disputed transactions took place entirely within China among Chinese parties (including Wil-Bao, the Chinese joint venture), and caused no "direct effect" in the United States. (Tr. 4/23/04, at 191:18-192:20 (Mr. Brady).)

9. The Tenth Circuit has addressed the construction of § 1605(a)(2)'s "direct effect" provision: "At the outset, we must concede that we have struggled to identify objective standards that aid in determining what does and does not qualify as a 'direct effect in the United States.' The phrase itself seems hopelessly ambiguous when applied to any particular

transaction." *Mangyshlakneft Oil*, 33 F.3d at 1237.[187] *Mangyschlakneft*

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[187] The *Mangyshlakneft Oil* court first looked to the facts in the *Weltover* case. In *Weltover*, plaintiffs were bondholders of certain bonds on which Argentina was to make payment of principal and interest upon maturity at a place designated by the bondholders. Plaintiff bondholders specified New York as the place of payment, and upon Argentina's default, filed suit in the United States District Court for the Southern District of New York. Plaintiffs argued that Argentina's non-payment had a "direct effect in the United States," and that Argentina was thus within the district court's jurisdiction under the FSIA's "commercial activity" exception.

On appeal, the Supreme Court agreed. Observing that an effect is "direct" if "'it follows as an immediate consequence of the defendant's . . . activity,'" the Court concluded that Argentina's failure to pay necessarily had such an effect: "Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." 504 U.S. at 618, 619 (quoting *Republic of Argentina v. Weltover*, 941 F.2d 145, 152 (2d Cir. 1991)). To be "direct" under *Weltover*, the effect need be neither substantial nor foreseeable: "we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.* at 618.

The *Weltover* Court was also satisfied that the exercise of jurisdiction over Argentina satisfied the "minimum contacts" requirements of Due Process: "By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina '"purposefully avail[ed] itself of the privilege of conducting activities in within the [United States].'"" *Id.* at 519-20 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

[p. 184]

*Oil* rejected that plaintiff's assertion of FSIA jurisdiction over a breach of a contract which had specified Paris as the place of payment of funds not yet paid: "[N]o part of the contract in this case was to be performed in the United States. . . . Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States. Such is the case here." 33 F.3d at 1237, 1238 (footnote omitted).

10. The Bank of China has argued that like *Mangyschlakneft Oil*, no part of its contractual obligations to either Orient Mineral or the Wil-Bao joint venture were to be performed in the United States. However, the FSIA's "commercial activity" exception embraces more than the performance of contractual obligations; "commercial torts" committed by a foreign state engaged in commercial activity also fall within its scope. In *Export Group v. Reef Industries*, 54 F.3d 1466 (9th Cir. 1995), the Ninth Circuit held that § 1605(a)(2) encompassed a claim for tortious interference with contract rights,

[p. 185]

notwithstanding other language in § 1605(a)(5)(B) which immunizes foreign states against liability for "non-commercial torts" when "acting in their noncommercial, sovereign capacity." *Id.* at 1477. To the extent, then, that the Bank of China's alleged conduct constitutes a tort arising out of commercial activity, the § 1605(a)(2) exception applies if that tortious conduct had a "direct effect in the United States," that

is, an effect that "follows as an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. at 519 (internal quotation omitted).

11. The Bank of China has contended that no "legally significant act" bearing upon Plaintiffs' commercial tort claims occurred in the United States, at least as far as the conduct of the Bank is concerned, and that some "legally significant act" must occur or be contractually obligated to occur in the United States or the requisite "direct effect" is lacking. Yet § 1605(a)(2) speaks of "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" that "causes a direct effect in the United States." As the Fifth Circuit has observed concerning the direct effect clause, "the only act that must be legally significant—that is, give rise to or form the basis of the cause of action—is the act *outside* the United States." *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d at 894 (emphasis in original).[188] A closer reading of *Mangyschlakneft Oil* suggests that the Tenth Circuit considered all of the facts in

[p. 186]

evaluating "direct effect," not merely the "legally significant" acts: "*When all of the facts are examined together in this case, including the 'legally significant*

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[188] The "act outside the United States" at issue in *Voest-Alpine* was "the Bank of China's failure to pay on a letter of credit it issued," resulting in "a nontrivial financial loss in the United States" to plaintiff, an American corporation. 142 F.3d at 897.

*acts,'* we are compelled to find that the direct effect of the defendants' alleged acts occurred in Europe rather than in the United States." 33 F.3d at 1239 (emphasis added).[189] For the Tenth Circuit, the fact that plaintiff "is an American corporation that suffered a financial loss" by itself was not "sufficient to place the direct effect of the defendants' actions 'in the United States.'" *Id. See also Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).[190]

12. The court was and is persuaded that the Bank's August 28, 1996 wire transfer of US$400,000 to Zions First National Bank in Sandy, Utah, for remittance to Saren Gaowa—parties located within the United States—had a "direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2). If, as Plaintiffs allege, the Bank of China's conduct in making that transfer constitutes a commercial tort, such conduct is embraced within the FSIA's "commercial activity" exception, and to that extent, at least, this court has subject-matter jurisdiction over Plaintiffs' claims against the Bank pursuant to the FSIA.

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[189] The *Mangyschlakneft Oil* case arose from "a contract entered into by the parties in Moscow . . . [that] called for the defendants to deliver oil from Kazakhstan to Sicily" with payment to be made in London and Paris.

[190] Plaintiffs' counsel argues that "another direct effect I think is really the lack of profit going to [the] U.S. which was the central interest." (Tr. 4/23/04, at 200:1-3 (Mr. Ludwig).)

13. Plaintiffs argue that this conclusion as to the US$ 400,000 transfer extends

[p. 187]

this court's FSIA jurisdiction to Plaintiffs' "entire case" against the Bank of China, including their claims arising from other acts, transactions and effects that occurred entirely within China among parties entirely Chinese. (*See* Plaintiffs' Bench Memorandum on FSIA Jurisdiction, dated June 17, 2004 (dkt. no. 335), at 8-11 (citing *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002)).) Plaintiffs' "entire case" theory suggests that one discrete act having a "direct effect" in the United States extends the jurisdiction of the federal courts over a whole laundry list of localized claims arising between the parties within the territory of a foreign state.[191] In effect, Plaintiffs read the permissive claims joinder provision of Fed. R. Civ. P.18(a)[192] into § 1605(2)'s "commercial activity"

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[191] Plaintiffs footnote *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), for the proposition that "the term 'action' has been held to encompass all claims that 'derive from a common nucleus of operative fact,'" and assert that "action" within the meaning of the FSIA incorporates this proposition. (Plaintiffs' Bench Memorandum on FSIA Jurisdiction, dated June 17, 2004, at 8-9 n.7.)

Apparently the "common nucleus of operative fact" in this case embraces all events and transactions involving the Bank of China, Orient Mineral *and/or* Wil-Bao from April, 1996 forward.

[192] Fed. R. Civ. P. 18(a) provides that "[a] party asserting a claim to relief as an original claim . . . may join, either as independent

exception to the FSIA's grant of immunity to foreign states.[193]

14. The court declines to adopt Plaintiffs' expansive view of jurisdiction under the FSIA.[194] Section

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or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party."

[193] Plaintiffs also argue that the Bank is liable for consequential damages resulting from the US$ 400,000 transfer, including Wil-Bao's lost profits on both mining properties. (*See, e.g.*, Tr. 4/23/04, at 142:20-144:5, 149:9-15 (Mr. Ludwig).)

[194] Generally, the court would make findings of fact and conclusions of law concerning only those matters found to be within the court's jurisdiction, in this case the US$ 400,000 transfer to Ms. Gaowa in August of 1996. *See generally* Fed. R. Civ. P. 52 (a). Nevertheless, in the interest of the "just, speedy, and inexpensive determination"of this nearly seven-year-old civil action, *see* Fed. R. Civ. P. 1, this court has made findings of fact and conclusions of law concerning *all* of Plaintiffs' pleaded claims against the Bank of China as well as the material evidentiary facts and legal propositions surrounding those claims.

Any findings or conclusions beyond those bearing upon Plaintiffs' claims arising from the US$ 400,000 transfer are made on a provisional basis and as factual and legal background and predicate for this court's judgment on the matter now properly before it, *viz.*, the US$ 400,000 transfer, particularly in light of the Plaintiffs' sweeping claim of civil conspiracy. Should it subsequently be determined that this court in fact has subject-matter jurisdiction under FSIA to the full extent urged by Plaintiffs, the court would enter judgment at that point based upon *all* of the findings and conclusions set forth herein as to all of Plaintiffs' claims, thus deciding the merits of Plaintiffs' claims in their entirety.

1605(a)(2) grants jurisdiction "in any case . . . (2) in which *the*

[p. 188]

*action is based upon . . . an act* outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and *that act* causes a direct effect in the United States." (Emphasis added.) It does not say any case in which the action is based *in part* upon an act outside the territory that causes a direct effect in the United States. The boundaries of the action which may be brought under § 1605(a)(2)'s "direct effect" clause are defined and constrained by the discrete "act" causing the direct effect.

**Breach of Contract**

15. It is a well-recognized principle that, "A condition precedent to the enforcement of any contract is that there be a *meeting of the minds* of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced." *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976) (emphasis added & citation omitted).

16. The contract between Orient Mineral and the Bank of China was formed by the conduct of Orient Mineral in (*i*) wiring US$ 3 million to the Lingbao Sub-branch, (*ii*)

* * *

[p. 235]

For the reasons set forth above, the Defendant Bank of China is entitled to (1) the entry of Judgment in its favor on Plaintiffs' claims to the extent those claims are based upon the August 28, 1996 transfer of US$ 400,000 by the Bank of China from its Lingbao Sub-branch in China to the United States, an act outside of the United States having a "direct effect" within the United States within the meaning of 28 U.S.C. § 1605(a)(2) (2000); and (2) an Order dismissing the remainder of Plaintiffs' claims for lack of jurisdiction pursuant to 28 U.S.C. § 1604 (2000).

**SO ORDERED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED this 26 day of January, 2005.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States Senior District Judge

* * *

[A1049]

TAB A

Letterhead of Lingbao City Subbranch
of Bank of China

Dear Mr. Yue Xiaoqun:

Our bank already received your application on May 14, 1996, and we agree to establish in our bank a temporary ~~[suspense]~~ U.S. dollar account at the request of your honorable company (Sino-U.S. Joint Venture Henan Wil-Bao Metal Smelting Company, Ltd.). We now advise the relevant particulars as follows:

Account name: ORIENT MINERAL CO.
Account number: 14833
Bank opening the account: Lingbao City Subbranch, Henan Provincial Branch, Bank of China

After the funds are transferred in ~~to this account~~, our bank will be responsible for safekeeping these funds. Further, Mr. Yue Xiaoqun must bring to our bank the business license of ORIENT MINERAL CO., the company chop [or seal], and a company authorization letter ~~[for its representative]~~, and go through the formalities, so that the funds can be used in the joint venture in accord with arrangements made by the representative of the American party.

[End]

Liu Lin (signature)
Director of Business Department
Lingbao Subbranch, Bank of China
May 14, 1996

Official business seal of Lingbao City
of Subbranch of Bank of China

[OW 00085]
[PLAINTIFF'S EXHIBIT 235]
[EXHIBIT 4]

[A1774]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2 :98CV-238

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|---|---|
| ORIENT MINERAL, et al. , | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| BANK OF CHINA, et al., | ) |
| | ) |
| Defendant. | ) |
| | ) |

Salt Lake City, Utah
Date: May 3, 2002
Time: 9:30 a.m.

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE BRUCE S. JENKINS

APPEARANCES OF COUNSEL:

For the Plaintiff:

ALLAN O. WALSH, ESQ., and
ROBERT W. LUDWIG, ESQ.

For the Defendants:

ARTHUR B. BERGER, ESQ., and
CHRISTOPHER BRADY, ESQ.

Also present:

DAVID KELLY, ESQ.

Court Reporter:

REEVE M. BUTLER, RPR
Official Court Reporter
Rm. 224 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

* * *

[A1778]

what the court is saying about policies and procedures and that could apply to what else went out the door without Mr. Jones' authorization. We would need to see the transaction itself which we don't have to see if the policies and procedures were followed with respect to those so if I can just nudge --

THE COURT: Well the papers are there aren't they?

MR. LUDWIG: Not as to the other transfers.

MR. BRADY: As to the 3 transfers, this one here and the 2 in Nevada, those papers were annexed to our papers.

Mr. LUDWIG: But the other transfers Your Honor that the court --

THE COURT: Skip the other transfers, practices and procedures.

MR. LUDWIG: It sounds like there's a possibility we'll be going to pretrial and then trial without having discovery on the merits of the other transfers when in fact --

THE COURT: I don't have the other transfers in front of me.

MR. LUDWIG: Yes you do Your Honor, it's been plead.

THE COURT: Pardon me?

MR. LUDWIG: It's been plead in the complaint. We've lost $2.9 million, only $400,000 of which went to Utah. The rest of it involved partial acts or omission in the U. S. and thus there is no jurisdictional immunity.

[A1779]

THE COURT: Are there other transfers of the 2.9 into the United States?

MR. LUDWIG: No, it doesn't require even under the court's own --

THE COURT: Whatever the requirement is are there other transfers other than the 2 in Nevada?

MR. LUDWIG: There's one --no, Your Honor, but we're not talking about a transfer that has too come to the U.S.

THE COURT: If you want to sue them on transfers in China go to China. We'll deal with the 3, that's what we'll deal with at this point as far as discovery goes.

MR. LUDWIG: And subject to leave to renew our motion?

THE COURT: I'm available for appropriate motions of at any time but let's get at it. You know, we can drag our feet as you suggest for another 4 years. Let's not do that, let's get it done.

MR. LUDWIG: Plaintiffs certainly don't wish that too.

THE COURT: And how soon can you get it done?

MR. BRADY: I said I'll get it done in 20 days. I don't know how soon --

THE COURT: How soon can you finish yours?

MR. LUDWIG: I'm not sure what he's asking for. It

[A1840]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:98CV-238

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|---|---|
| ORIENT MINERAL, et al. , | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| vs. | ) |
| | ) |
| BANK OF CHINA, et al., | ) |
| | ) |
| Defendants. | ) |
| | ) |

Salt Lake City, Utah
Date: February 7, 2003
Time: 9:30 a.m.

REPORTER'S TRANSCRIPT
BEFORE: THE HONORABLE BRUCE S. JENKINS

APPEARANCES OF COUNSEL:

For the Plaintiff:
ROBERT W. LUDWIG, ESQ., and
ALLAN WALSH, ESQ

For the Defendants:

CHRISTOPHER BRADY, ESQ.,
ARTHUR B. BERGER, ESQ., and
FRANKLIN SMITH, ESQ.

Court Reporter:
REEVE M. BUTLER
Official Court Reporter, RPR
Rm. 467 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

* * *

[A1864]

MR. LUDWIG: That's right, that's a fraudulent omission Your Honor. The plaintiffs had on deposit at that point in time without even looking to the May deposit funds under contract that required the Bank not to transfer anything over $25,000.

THE COURT: Well I understand that and I understand your argument on contract. You say this is over 25 and thus they breached, okay, I understand that.

MR. LUDWIG: And the omission to perform is, and coupled with the misrepresentations to the SAEC, the act of concealment of the reason for the transfer.

THE COURT: Well all of this is evidence of what occurred, historically what occurred. Do you say that equals breach or that equals negligence, I can understand that.

MR. LUDWIG: Right, and it equals fraud and it equals negligent misrepresentation as a lessor standard than fraud. At all times relevant the Bank held itself out to its U.S. customer and to Wil-Bao that those funds would not be transferred. Now when the funds are transferred that makes the standing representation false, a misrepresentation.

THE COURT: Well they, using your theory they, they didn't follow what they said they'd do, you see they said I'll keep your funds safe according to your document and they didn't keep your funds safe, they transferred it out. Okay. They didn't do what they promised you they'd do but that

[A1865]

doesn't, that doesn't necessarily equate to fraud.

MR. LUDWIG: It doesn't but it give rise because of the badges of fraud and the inferences to support an evidence for plaintiff's allegations that they were intentionally mislead. It's both a breach of contract, it's also a misrepresentation, it's also negligent misrepresentation, it's also negligence. We don't have to elect remedies.

THE COURT: Well I can understand each of those theories on the bases of the Bank doing or not doing something and you say there's an ongoing representation here that we're going to keep the funds safe and we continue to make that representation to you because we've got a contract with you, we're going to do that.

Well we didn't keep the funds safe. You say well what did these folks do in reference to this ongoing representation which purportedly continues on after the inappropriate transfer alleged you see. What's to decide. Okay. What did these folks do in reliance. I'm going to keep your funds safe. That's the only representation that purportedly was made to them.

MR. LUDWIG: Under a certain term, a specific contractual term.

THE COURT: Okay.

MR. LUDWIG: And in fact our client the evidence will show acted in accordance with that understanding

* * *

[A1867]

carries over to the second account and into the Chinese account, okay, I can understand that and they broke their promise, they didn't keep it, but we do have a specific example that you claim somebody transferred $400,000 to an ex-wife that found its way into a house but that doesn't raise much beyond the $400,000, you know, you want to talk about consequential damages, lost opportunities of the 400, you know, that's a pretty far reach.

MR. LUDWIG: Well, Your Honor, I just want it clear that you're not permitting us on the fraud count to introduce evidence of the circumstances surrounding the opening of the account and the transfers that occurred in May 1996 --

THE COURT: No, I'm not making an evidentiary ruling at all, I'm trying to define what issues are in dispute so that we can ultimately try this matter and we'll identify disputed issues in clear form so that everybody knows this is what we're trying.

MR. LUDWIG: Well I tried to argue that evidence in support of the fraud theory and the court refused to hear that evidence and said that the deposits are not at issue it's only the $400,000 transfer that's at issue. Now that transfer occurred within 2 short months --

THE COURT: You see if you want to sue them in China have at it. We're dealing with the impact here in the United States and that's something we can trace. We've got

[A1868]

the money you see and we can trace that money.

MR. LUDWIG: Your Honor, this case has already seen one interlocutory appeal to the Tenth Circuit --

THE COURT: That's fine, you know, that's part of the process.

MR. LUDWIG: We would request because at this point I think trial would be perhaps an injudicious application of judicial time and effort as well as the parties --

THE COURT: Well it may be but we're going to define what it is that's in dispute and you're going to help me do that and once we define what's in dispute

then we're going to try it and depending on the outcome you may want to appeal the matter. That's part of the process. I welcome the oversight that occurs. I'm always interested in more than one set of eyes looking at something.

MR. LUDWIG: Well I would request at this time the court entertain plaintiff's request for interlocutory appeal on the FSIA issue because clearly that changes the complexion of the case not only in a damages sense but apparently in the court's view as to what evidence is relevant and admissible to support our claims.

THE COURT: I haven't made any evidentiary rulings other than to point out that the suggestion as to what you want to use as a footing for a conspiracy is adequate to deal with the question of conspiracy.

* * *

[A1870]

MR. LUDWIG: And I believe Your Honor's ruling is largely that at this point you believe I've only proffered a possible conspiracy as opposed to sufficient circumstantial evidence and I understand the court's ruling. What I'm now asking is whether that is all the court's ruling out?

THE COURT: That's all I've done so far.

MR. LUDWIG: Okay. Beyond that we have counts of course for breach of contract, for fraud, for negligence and negligent misrepresentation as to the matter.

THE COURT: And we're trying to discuss those in the sense of trying to isolate facts, facts that are genuinely in dispute.

MR. LUDWIG: Okay.

THE COURT: But as to contract you say this is the terms, these are the terms. As a result of their breaching the contract, transfer, inappropriate transfer. Well that transfer of 400 came here, the impact was here, money is tracing.

MR. LUDWIG: Okay. Well then it becomes a question of the scope of the remaining counts.

THE COURT: It sure does.

MR. LUDWIG: And the court has made several references to suing the Bank in China if plaintiffs wished. Plaintiffs actually wish and have done so to sue the Bank in the Untied States and we think we're supported in that under

[A1871]

the FSIA and applicable case law. Is the court ruling that we may recover no more than the $400,000 transfer that was received here in salt Lake?

MR. LUDWIG: Well that's the one where there's the impact.

MR. LUDWIG: Well impact is the third prong and the third prong only of Section 1605(a)2 of FSIA. I've argued all 3 prongs. I've also argued that the impact is broader even under the third prong than the one transfer. I think if the court is going to reduce the scope to $400,000 that that alters the complexion of the case drastically.

It might make more sense if that's the court's ruling to permit an interlocutory appeal --

THE COURT: No. We're going to try that case so that those who review it have everything before it, before them you see.

MR. LUDWIG: Well I'm concerned --

THE COURT: That makes sense.

MR. LUDWIG: I'm concerned because I did try to suggest as the facts in dispute with respect to the fraud claim that the inducements in opening up the account ab initio and in fact inducements for the $3 million transfer are not in the case or the court wasn't interested in hearing about those facts in support of our fraud claim so it seems --

* * *

[A1893]

factual issues, I think Orient's claim should be dismissed.

THE COURT: It is. So ordered.

MR. BRADY: Thank you, Your Honor. And as to the Wil-Bao claims I've addressed those.

THE COURT: Okay.

MR. LUDWIG: Your Honor, that happened rather quickly; Did I hear that Orient Mineral Company's claims have been dismissed?

THE COURT: They are. The reason being is that the directions of Orient seem to have been followed without dispute.

MR. LUDWIG: Your Honor, that's not the record and I have strenuously tried to point out how that's a disputed issue of fact here and I've also carefully delineated --

THE COURT: Eck says to the Bank of China follow the directions of Preston Jones. The resolution says follow the directions of Preston Jones. Preston Jones signed the transfer order into the Wil-Bao account. The money was transferred into the Wil-Bao account pursuant to the Orient directions, Eck, the board. They did what they were told.

Now whether or not the bank in reference to Wil-Bao did what it's supposed to do is another question but I think it's pretty clear what happened and motion's granted. We're down to Wil-Bao and there's where we are, let's talk about Wil-Bao.

[A1894]

MR. LUDWIG: Well just so the record's clear the facts are clearly in dispute. It's clearly a case where Preston Jones was to give instructions that were to be followed. His instructions that an account with a dollar limit were not followed, thus you have --

THE COURT: No. Orient says in resolution, Orient says do what Jones says to do. Now Jones, there may be some question as to whether they did what Jones said but it appears to me that Jones is the trigger.

MR. LUDWIG: Your Honor, Jones did 2 things and four Honor has focused on one only and that is the Chinese transfer slip that he can't read that has mistakes on it. What he also did as the authorized representative as the bank well knew although disputes, it says it never could even read the May 16 Eck letter and Orient Mineral Resolution according to the statements that are signed by Mr. Wang and Madam Zhou, that he also gave them a Wil-Bao resolution that contained a $25,000 limitation.

THE COURT: I understand that, I don't have any trouble with that.

MR. LUDWIG: So if they did not follow that direction of --

THE COURT: No. Good or bad they said do what Jones tells you to do.

MR. LUDWIG: And they didn't do it.

[A1895]

THE COURT: That's the, that's the pitch.

MR. LUDWIG: But what Jones told them to do was to open an account and if I cannot have an Orient Mineral control account then open an account in the name of Wil-Bao that has a $25,000 limitation on that. The undisputed facts are they did not do that. That is a breach of the contract with Orient Mineral Company.

THE COURT: Yeah, well the order's granted and we'll go from there and I may be wrong and I'm often wrong but we're here, we're dealing with money transferred out of Wil-Bao's account to Saren Gaowa on a particular occasion allegedly in violation of the arrangement is the breach claimed against the bank found in paragraphs 26 and 27 of the first amended complaint.

MR. LUDWIG: Your Honor, by referring to the Saren Gaowa amount again has the court implicitly or explicitly ruled that as a matter of its FSIA jurisdiction that only the $400,000 claim is what the court is exercising jurisdiction over?

THE COURT: No. My question is is the breach that you're alleging against the bank found in paragraphs 26 and 27 of the first amended complaint or is it something else? * * *

[A250]

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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:98-CV-238J

| | |
|---|---|
| ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO. LTD., Plaintiffs, | ) |
| v. | ) |
| BANK OF CHINA, DAVID YUE, aka YIAOQUN YUE, and SAREN GAOWA, and DOES 1-30, Defendants. | ) |

BANK OF CHINA,
Counterclaim-Plaintiff,

v.

ORIENT MINERAL COMPANY, F. THOMAS ECK, III, ART WILSON, PRESTON JONES, and JOHN DOE(S), and WIL-BAO MINERAL CO. LTD.,
Counterclaim-Defendants.

**BANK OF CHINA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

* * *

[A261]

respect to the Orient Board Resolution and cover letter, which the Bank had separately translated, the Bank relied upon Yue's statements in Chinese as the statements and representations of Orient, Wil-Bao, and Jones. (Trans. E at 18.)

**Orient's Direction for Transfer of Funds**

39. At the May 27, 1996 meeting, Yue stated that Wil-Bao wished to open two accounts with the Bank, one in US dollars and one in local Chinese currency (Renminbi), and that Orient wished to transfer the entire amount of the McKee wire transfer into the Wil-Bao US dollar account. (Trans. E at 54.) Yue also stated that Orient had appointed Jones as its exclusive

representative to dispose of the wired funds. (Trans. K at 65; Trans. E at 26-27.)

40. Eck then handed the Orient Board Resolution and cover letter to Mr. Wang. (Trans. B at 94-95; PX-8.) Yue told the Bank officers that the two Orient documents appointed Jones to direct what to do with the $3 million wired funds and stated that the Bank would be indemnified if it followed Jones' directions. (Trans. E at 15; Trans. K at 66.)

41. Mr. Wang had a bank clerk prepare a written translation of the two Orient documents and found that the written translation confirmed Yue's verbal explanation. (Trans. B at 95; Trans. E at 15, 18, 23, 55.)

42. Accordingly, the terms of the agreement between Orient and the Bank concerning the creation of the Wil-Bao accounts were, first, that the Bank will follow the directions of Orient's representative, Preston Jones, in creating the Wil-Bao accounts and in transferring the wired funds thereto and, second, that Orient will indemnify the Bank if it follows Jones's directions.

43. On May 27, 1996, Jones, on behalf of Orient, signed the transfer slip directing that all of the wired funds be transferred into the newly created Wil-Bao U.S. dollar account. The Bank

[A1715]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH,
CENTRAL DIVISION

Case No. 2:98CV002385

| | |
|---|---|
| ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO., LTD., Plaintiff, | ) |
| v. | ) |
| BANK OF CHINA, ET AL, Defendant. | ) |

Volume IV

CONTINUED DEPOSITION UPON ORAL EXAMINATION OF WANG YIN CHUANG

DATE TAKEN: October 20, 2002

TAKEN AT: McKay, Burton & Thurman
10 East South Temple
Salt Lake City, Utah

TAKEN BY: Susan Hasna Pearce - CSR, RPR, CP

[A1716]

Read it back in pieces and translate the pieces, please.

(The reporter read back the question.)

THE INTERPRETER: Yes, under --under certain conditions was a problem, like the attorney from plaintiff just said, the beneficiary was Bin Laden

Even if our assumptions did not find out this problem, but this fund was transferred through many levels of transaction, we had to go through Sanmenxia, Sanmenxia had to go through Hunan province branch, the province branch need to go through Hunan. Then the Hunan province branch had to go to the – New York. And then the bank in New York had to transfer the fund into the bank here that's stated on this voucher. This fund had many layer. Of course, there's no way that this money will go to Bin Laden. If -- suppose that this money got wired into the name of Bin Laden, not only involve branch had to be responsible for this, Sanmenxia branch, Hunan province branch and the New York branch and also the bank --

MR. LUDWIG: We understand.

[A1576]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

CASE NO. 2:98-CV-238J

| | |
|---|---|
| ORIENT MINERAL COMPANY, a Nevada corporation, et al., Plaintiffs, | ) |
| vs. | ) |
| BANK OF CHINA, a foreign Banking Institution, et al., Defendants. | ) |

BEFORE THE HONORABLE BRUCE S. JENKINS

April 20, 2004

Bench Trial

* * *

[A1593]

then the money will be deposited temporarily in that account. If the money doesn't come in, it doesn't matter whether we give them account number or not. Like the letter of May 14, 1996 addressed to Yue Xiaoqun, we provided Mr. Yue a route for him to transfer the money -- wire money into our bank. If his money is

wired into our Bank of China, LingBao sub branch, then we will be responsible for keeping the money, but wait for the owner of the money to come determine how to handle this money. Even though we give him this letter, if his money is not wired into our bank, this letter doesn't serve any purpose. That's the situation. It's nothing abnormal.

Q. You described it as unusual, correct?

A. Some people ask us to provide a region document and we do it. But this is not a common case letter like this. If it is requested, then we can provide it.

Q. Madam Liu, didn't you further give this answer to this question on the same page, 75, line 18, question: But you are making assurances to the American company, Orient Mineral, that it will hold the funds that it transfers for safekeeping until they name the U.S. representative and he gives further instructions; isn't that correct? And this is your answer in your deposition: It is stated so on this letter and it was done. We also do according to this letter.

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**No. 03-4273**

**[Filed February 6, 2004]**

| | |
|---|---|
| In re: | ) |
| | ) |
| ORIENT MINERAL, a Nevada corporation and WIL-BAO MINERAL CO., | ) |
| | ) |
| Petitioners. | ) |
| | ) |
| BANK OF CHINA, a foreign Banking Institution, doing business in the United States, | ) |
| | ) |
| Real Party in Interest. | ) |

### ORDER

Before SEYMOUR, EBEL, and KELLY, Circuit Judges.

Petitioners seek a writ of mandamus to compel the Honorable Bruce Jenkins to take jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C.

§§ 1330 & 1602-11, over their entire case against the Bank of China. They also request the court to compel Judge Jenkins to recuse himself on the assertion that Judge Jenkins has prejudged matters that are in dispute.

Mandamus is an extraordinary remedy that will issue only upon a showing that (1) the petitioner has a "clear right to the relief sought," (2) the respondent has "a plainly defined and peremptory duty . . . to do the action in question," and (3) "no other adequate remedy [is] available." *Johnson v. Rogers,* 917 F.2d 1283, 1285 (10th Cir. 1990). The petitioner seeking the issuance of a writ of mandamus bears the burden of showing that his or her right to the writ is "clear and indisputable." *Nichols v. Alley,* 71 F.3d 347, 350 (10th Cir. 1995).

Mandamus is not a substitute for appeal, *see Weston v. Mann (In re Weston),* 18 F.3d 860, 864 (10th Cir. 1994), and "will issue only in those exceptional cases where the [district] court has acted wholly without jurisdiction or so clearly abused its discretion as to constitute a judicial usurpation of power." *Pacificare of Okla., Inc. v. Burrage,* 59 F.3d 151, 153 (10th Cir. 1995) (quotation omitted). Petitioners may appeal Judge Jenkins' subject-matter-jurisdiction and summary-judgment rulings after final judgment is entered.

Although Judge Jenkins has made some interlocutory rulings adverse to petitioners, we are not convinced that he has prejudged issues in such a way that he will be forced to decide an issue in favor of respondent regardless of the evidence presented to him

at trial. *See Frates v. Weinshienk,* 882 F.2d 1502, 1506 (10th Cir. 1989). Thus, we hold that petitioners have not established actual bias or an appearance of such partiality as to require recusal.

Petitioners' motion to file a reply is DENIED. The petition for a writ of mandamus is DENIED.

Entered for the Court
PATRICK FISHER, Clerk

By: /s/
Deputy Clerk

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

**No. 99-4174**
**D.C. No. 98-CV-238**

**[Filed December 12, 2000]**

ORIENT MINERAL, a Nevada corporation,

Plaintiff-Counter-Defendant-Appellee,

v.

DAVID YUE, aka YIAOQUN YUE; SAREN GAOWA,

Defendants,

and

BANK OF CHINA, a foreign Banking Institution doing business in the United States,

Defendant-Cross-Claimant-Appellant.

COUNSEL: For ORIENT MINERAL, Plaintiff-Counter-Defendant-Appellee: Allan O. Walsh, McKay, Burton & Thurman, Salt Lake City, UT. Frank Thomas Eck IV, The Eck Law Firm, Washington, DC.

For BANK OF CHINA, Defendant-Cross-Claimant-Appellant: Arthur B. Berger, Ray, Quinney & Nebeker, Salt Lake City, UT. Christopher Brady, Mary C. Mone, Hollyer, Brady, Smith & Hines, New York, NY.

## ORDER AND JUDGMENT*

Before LUCERO, Circuit Judge, McWILLIAMS, Circuit Judge, and ALLEY**, Senior District Judge.

On April 3, 1998, Orient Mineral Company ("Orient"), a Nevada corporation, filed a complaint in the United States District Court for the District of Utah, naming as defendants the Bank of China ("Bank"), described in the caption of the complaint as a foreign banking institution doing business in the United States, David Yue and Saren Gaowa. The Bank was identified in the body of the complaint as a foreign banking institution doing business in the United States with its main office in Los Angeles, California.[1] David Yue is described in the complaint as a citizen of the People's Republic of China, who was residing in Utah and owned property in Utah, and Saren Gaowa is described as the spouse of David Yue and was also residing in Utah. It was alleged in the complaint that

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable Wayne E. Alley, Senior District Judge of the Western District of Oklahoma, sitting by designation.

[1] On appeal, it is apparently agreed that the Bank is wholly owned by the People's Republic of China, and is therefore an agency or instrumentality of a "foreign state," and, being such, a "foreign state" under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1603.

jurisdiction was based on diversity of citizenship, 28 U.S.C. §§ 1331 and 1332, and that the amount in controversy exceeded $ 100,000.00. For the purposes of this order and judgment, we need not set forth the four causes of action asserted by Orient against the defendants.

After answering the complaint[2], the Bank filed a motion pursuant to Fed. R. Civ. P. 12(c) asking for judgment on the pleadings based on the following: (1) the district court lacked subject matter jurisdiction and personal jurisdiction under FSIA, 28 U.S.C. §§ 1330, 1604; (2) venue was improper under FSIA, 28 U.S.C. § 1391(f); and (3) service of process on the Bank was insufficient under FSIA, 28 U.S.C. § 1608 and the Hague Convention. In support of that motion the Bank filed a memorandum brief with supporting affidavits, to which Orient filed a brief in opposition.

On July 19, 1999, the district court held that it did have subject matter jurisdiction over the controversy, and that venue was properly in Utah, but that there was no proper service of process on the Bank. In this latter connection, Orient had purported to serve the Bank by serving the Chinese Consulate of the People's Republic of China located in San Francisco, California. The district court held that such did not comport with 28 U.S.C. § 1608(b), and that the Bank had not "waived its objections to service by filing the pleadings

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[2] By amended answer, the Bank alleged, *inter alia*, that the district court lacked subject matter jurisdiction and personal jurisdiction over it and that the purported service of process was insufficient.

it has filed to date." The district court concluded by granting that part of the Bank's motion for judgment on the pleadings "to the extent that it is based upon insufficient service of process" and in connection therewith quashed the purported service of the Bank by service on the Chinese Consulate in San Francisco. In this regard, the district court granted Orient 30 days within which to effect service of process pursuant to 28 U.S.C. § 1608(b), with the proviso that "if service is not accomplished within that time, the complaint shall be deemed dismissed as against the Bank of China, without prejudice."[3] However, the district court, at the same time, went on to deny the Bank's motion insofar as it sought a determination by the district court that it lacked subject matter jurisdiction.

On August 18, 1999, the Bank filed a notice of appeal wherein it appealed that part of the district court's order of July 19, 1999, denying the Bank's motion for judgment on the pleadings on the ground that the district court lacked subject matter jurisdiction under FSIA. 28 U.S.C. § 1604. In its notice of appeal, the Bank asserted that the district court's order as concerns the immunity issue was "immediately appealable," citing *U.S. v. Moats*, 961 F.2d 1198 (5th Cir. 1992) and *Stena Rederi AB v.*

---

[3] On August 12, 1999, Orient filed a motion in the district court to extend the time up to and including December 31, 1999, to file its return of service of process on the Bank. That motion was granted by the district court on August 18, 1999. The record before us does not indicate that any return of service of process was filed on or before December 31, 1999, or at any time thereafter.

*Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991).[4]

In this court, both Orient and the Bank are only concerned with the question of whether the district court erred in concluding that it had subject matter jurisdiction under the "direct effect" prong of FSIA's "commercial activity" exception. 28 U.S.C. § 1605(a)(2). Our initial concern was whether we needed to address that issue, since it appeared from the record before us that Orient had not effected valid service of process on the Bank. In other words, if there was no valid service of process on the Bank, we were doubtful of any necessity to grapple with the question of subject matter jurisdiction. *Gadlin v. Sybron International Corp.*, 222 F.3d 797 (10th Cir. 2000). Accordingly, on September 18, 2000, we issued an Order to Show Cause, directing the parties to show within 30 days why this appeal should not be dismissed, and the case remanded to the district court with directions that it vacate that part of its order of July 19, 1999, wherein it held that there was subject matter jurisdiction. On October 17, 2000, Orient filed a response to our show cause order. On October 23, 2000, the Bank filed a motion for leave to file a reply to Orient's response, which motion was granted on November 3, 2000, and its tendered reply was accepted by this court.

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[4] Orient did not file a cross-appeal of that part of the district court's order of July 19, 1999, quashing its purported service of process on the Bank. Yue and Gaowa are not parties to this appeal.

In its response to our Order to Show Cause Orient stated that, in accordance with 28 U.S.C. § 1608 and the Hague Convention, it had caused a summons and complaint to be served upon the Chinese Central Authority and that the latter had "delivered" the summons and complaint to the Bank on September 23, 1999, but that it (Orient) had not yet received a certificate to that effect from the Chinese Central Authority. Further, in its response, Orient went on to state that, notwithstanding the failure of the Chinese Central Authority to return a certificate of service to it, counsel for the Bank had "agreed that the Bank has been served." Finally, in its response Orient stated that it had sent a letter to that effect to the district court on December 22, 1999.

In a reply to Orient's response, the Bank states that "[i]n fact . . . there was no 'agreement' by the Bank concerning service of process as alleged by Orient Mineral," although the Bank had decided to "not renew its dismissal motion but instead continue with its [then pending] appeal in this Court." Counsel for the Bank in his reply concluded by declaring that "[n]either during my December 22, 1999 telephone conversation with Mr. Eck [counsel for Orient] nor at any other time, have I or anyone else on behalf of the Bank of China 'agreed' that service of process under the requirements of the Foreign Sovereign Immunities Act ("FSIA") or the Hague Convention . . . – which require more than mere *delivery of the complaint* to a foreign state defendant such as the Bank of China – has been effected on the Bank or that the Bank of China 'considered itself so served'."

We are not inclined on the basis of Orient's response to our Order to Show Cause, and the Bank's reply thereto, to consider whether Orient has complied with the district court's order that it had until December 31, 1999, to effect valid service of process on the Bank, and, if not so served, the complaint as it related to the Bank would be "deemed dismissed . . . without prejudice." That question should be considered, in the first instance, in the district court. As stated above, the record of the district court before us shows that the district court quashed Orient's purported service of process, i.e., service on the Chinese Consulate in San Francisco, California, and granted Orient 30 days to effect service of process pursuant to 28 U.S.C. § 1608, which time was later extended to December 31, 1999. The record of the district court does not show compliance with the district court's order to effect service by December 31, 1999, or at any time thereafter. It is on this state of the record that we further decline to review the propriety of the district court's order denying the Bank's motion to dismiss on the ground that the district court lacked subject matter jurisdiction.

Accordingly, the appeal is dismissed and the case is remanded to the district court with directions that it vacate, as premature, that part of its order of July 19, 1999, wherein it held that there was subject matter jurisdiction. Further proceedings in the district court are to be consonant with the views herein expressed.

Entered for the court,

Robert H. McWilliams
Circuit Judge

## APPENDIX F

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF UTAH**
**CENTRAL DIVISION**

**Civil No. 2:98-CV-238J**

**[Filed July 19, 1999]**

| | |
|---|---|
| ORIENT MINERAL COMPANY, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| BANK OF CHINA, DAVID YUE aka YIAOQUN YUE, and SAREN GAOWA, | ) |
| | ) |
| Defendants. | ) |
| | ) |
| BANK OF CHINA, | ) |
| | ) |
| Counterclaim-Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| ORIENT MINERAL COMPANY, F. THOMAS ECK, III, ART WILSON, | ) |

PRESTON JONES, and JOHN DOE(S), )
)
Counterclaim-Defendants. )
)

## MEMORANDUM OPINION AND ORDER

On April 3, 1998, Orient Mineral Company filed its Complaint against the Bank of China, an instrumentality of the People's Republic of China, and two individuals, Yiaoqun "David" Yue and Saren Gaowa, alleging embezzlement, fraud, and conspiracy and seeking the imposition of a constructive trust. Plaintiff alleges that the Bank of China agreed to hold approximately $3,000,000 of Orient Mineral's money in the name of a joint venture known as Wil-Bao Mineral, Ltd., to be transferred only upon the express authorization of Preston Jones, a director of Wil- Bao. Notwithstanding this requirement, plaintiff avers, the Bank of China transferred approximately $2,700,000 out of the Wil-Bao account, $1.5 million of it without Preston Jones' signature.[1] These unauthorized transfers allegedly included a $400,000 transfer to the account of Saren Gaowa at Zions First National Bank in Utah on August 22, 1996. Orient Mineral alleges

[1] Curiously, Bank of China's "Summary of Facts" does not describe these transfers beyond stating that after the funds were transferred into the Wil-Bao account, "the funds in the account of Wil-Bao were handled in accordance with normal Chinese banking procedures applicable to joint ventures," citing to four exhibits. (Memorandum of Law of Bank of China in Support of its Motion for Judgment on the Pleadings, filed August 12, 1998 (dkt. no.21), at 5-6.)

that Gaowa used the money to buy real property in Sandy, Utah, and for other purposes.

**Bank of China's Motion for Judgment on the Pleadings**

On August 12, 1998, defendant Bank of China filed a motion for judgment on the pleadings, which was heard on October 9, 1998. Rather than addressing the substantive merit of Orient Mining's claims, Bank of China's Rule 12(c) motion raises objections to subject matter jurisdiction, personal jurisdiction, service of process, and venue. "A defendant may use a rule 12(c) motion after the close of the pleadings to raise various rule 12(b) defenses regarding procedural defects, in which case courts apply the same standard applicable to the corresponding 12(b) motion." *Alexander v. City of Chicago,* 994 F.2d 333, 336 (7th Cir. 1993) (citations omitted). The court will address each of the Bank of China's defenses in turn.

In essence, the Bank of China says it isn't here–that "all of the acts to be done–or not done–by the Bank in connection with Orient's funds were in China," and that this court therefore lacks both subject matter and personal jurisdiction. (Memorandum of Law of Bank of China in Support of its Motion for Judgment on the Pleadings, filed August 12, 1998 (dkt. no. 21) ("Bank Mem."), at 9.) Orient Mineral responds that Bank of China has engaged in "commercial activity" which "causes a direct effect in the United States" within the meaning of 28 U.S.C. § 1605, giving this court jurisdiction over Bank of China notwithstanding its foreign governmental status, and that Bank of China was properly served with process

at the Chinese Consulate in San Francisco. Venue is also proper, Orient Mineral suggests, because Saren Gaowa resides in Utah, and because "a substantial part of the property that is the subject of the action is situated" in Utah *See* 28 U.S.C. § 1391(b), (f).

**Subject Matter & Personal Jurisdiction**

The Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1602 *et seq.* (1994) ("FSIA"), "sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues raised in federal and state courts." *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 532 (5th Cir.), *cert. denied,* 506 U.S. 956 (1992) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state" or its instrumentalities in the federal courts. *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n,* 33 F.3d 1232, 1236 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995) (quoting *Argentine Republic v. Amarada Hess Shipping Corp.,* 488 U.S. 428, 443 (1989)). In general, the FSIA grants immunity from suit in United States courts to foreign states and corporations owned by foreign states for acts taken pursuant to their sovereign power even though these acts impact the United States. "Under the FSIA, foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the FSIA's exceptions applies." *Holden v. Canadian Consulate,* 92 F.3d 918, 920 (9th Cir. 1996), *cert. denied,* 519 U.S. 1091 (1997).

Under FSIA's "commercial activity" exception, 28 U.S.C.A. § 1605(a)(2), however, "foreign states are not

immune from federal jurisdiction for those actions taken that are similar to those of a private participant engaged in commerce." *Hanil Bank v. PT. Bank Negara Indonesia, (Persero),* 148 F.3d 127, 129 (2d Cir. 1998). Section 1605(a)(2) reads:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case–
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> * * * *

A foreign state engages in "commercial activity" when it exercises "only those powers that can also be exercised by private citizens," in contrast to the exercise of those "powers peculiar to sovereigns." *Saudi Arabia v. Nelson,* 507 U.S. 349, 360 (1993). The FSIA's "commercial activity" exception applies only where a foreign sovereign acts "in the market in the manner of a private player." *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 614 (1992).

It appears uncontroverted that the Bank of China is a corporation organized under the laws of the People's Republic of China and that the People's Republic of China owns all of the Bank's stock. Thus the Bank of China exists as a "separate legal person, corporate" in nature, "a majority of whose shares . . . is owned by a foreign state" and "which is neither a citizen of a State of the United States as defined in section 1332(c) and (d)" of Title 28, nor "created under the laws of any third country." 28 U.S.C.A. § 1603(b). As such, the Bank of China thus constitutes an "agency of instrumentality of a foreign state" and is deemed to be a "foreign state" for purposes of the FSIA and its "commercial activity" exception. 28 U.S.C.A. § 1603(a), (b). *See Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 890 (5th Cir. 1998) ("The Bank of China is an instrumentality of the People's Republic of China.")

**The "Commercial Activity" Exception**

Orient Mineral asserts that the Bank of China's transfer of $400,000 to Zions Bank and, ultimately, to Saren Gaowa in Utah represents an act that "cause[d] a direct effect in the United States" within the meaning of the FSIA's "commercial activity" exception, 28 U.S.C.A. § 1605(a)(2). The Bank of China responds that the pertinent transactions occurred in China and "'had no connection at all with the United States.'" (Bank Mem. at 9 (quoting *Mangyshlakneft Oil,* 33 F.3d at 1237).) "[N]o contract between Orient and the Bank was performed or due to be performed in the United States, nor was any 'legally significant act' (i.e., an act forming an element of the claim) done by the Bank or required to be done by the Bank in the United States."

(Reply Memorandum of Law of Bank of China in Further Support of its Motion for Judgment on the Pleadings, filed October 6, 1998 (dkt. no. 37) ("Reply Mem."), at 7.)

**"Direct Effect in the United States"**

The Tenth Circuit recently addressed the construction of § 1605(a)(2)'s "direct effect" provision: "At the outset, we must concede that we have struggled to identify objective standards that aid in determining what does and does not qualify as a 'direct effect in the United States.' The phrase itself seems hopelessly ambiguous when applied to any particular transaction." *Mangyshlakneft Oil,* 33 F.3d at 1237. The best sense the Tenth Circuit could make of the statutory language was by reference to the facts in the *Weltover* case.

In *Weltover,* plaintiffs were bondholders of certain bonds on which Argentina was to make payment of principal and interest upon maturity at a place designated by the bondholders. Plaintiff bondholders specified New York as the place of payment, and upon Argentina's default, filed suit in the United States District Court for the Southern District of New York. Plaintiffs argued that Argentina's non-payment had a "direct effect in the United States," and that Argentina was thus within the district court's jurisdiction under the FSIA's "commercial activity" exception. On appeal, the Supreme Court agreed. Observing that an effect is "direct" if "'it follows as an immediate consequence of the defendant's . . . activity,'" the Court concluded that Argentina's failure to pay necessarily had such an effect: "Money that was supposed to have been

delivered to a New York bank for deposit was not forthcoming." 504 U.S. at 618, 619 (quoting *Republic of Argentina v. Weltover,* 941 F.2d 145, 152 (2d Cir. 1991)). To be "direct," the effect need be neither substantial nor foreseeable: "we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.* at 618.

The *Weltover* Court was also satisfied that the exercise of jurisdiction over Argentina satisfied the "minimum contacts" requirements of Due Process: "By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina '"purposefully avail[ed] itself of the privilege of conducting activities in within the [United States]."'" *Id.* at 519-20 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958))).

Distinguishing *Weltover* based on its facts, the Tenth Circuit in *Mangyschlakneft Oil* rejected plaintiff's assertion of FSIA jurisdiction over a breach of a contract which had specified Paris as the place of payment of funds not yet paid: "[N]o part of the contract in this case was to be performed in the United States. . . . Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States. Such is the case here." 33 F.3d at 1237, 1238 (footnote omitted).

Bank of China argues that like *Mangyschlakneft Oil* and unlike *Weltover,* no part of its contractual

obligations to the Wil-Bao joint venture were to be performed in the United States.

However, the FSIA's "commercial activity" exception embraces more than the performance of contractual obligations; "commercial torts" committed by a foreign state engaged in commercial activity also fall within its scope. In *Export Group v. Reef Industries,* 54 F.3d 1466 (9th Cir. 1995), the Ninth Circuit held that § 1605(a)(2) encompassed a claim for tortious interference with contract rights, notwithstanding other language in § 1605(a)(5)(B) which immunizes foreign states against liability for "non-commercial torts" when "acting in their noncommercial, sovereign capacity." *Id.* at 1477. To the extent, then, that the Bank of China's alleged conduct constitutes a tort arising out of commercial activity, the § 1605(a)(2) exception applies if that tortious conduct had a "direct effect in the United States," that is, an effect that "follows as an immediate consequence of the defendant's . . . activity." *Weltover,* 504 U.S. at 519 (internal quotation omitted).

The Bank of China contends that no "'legally significant act' (i.e., an act forming an element of the claim)" bearing upon Orient Mineral's commercial tort claims occurred in the United States, at least as far as the conduct of the Bank is concerned. (Reply Mem. at 7.) "Tenth Circuit law," the Bank argues, "requires that some 'legally significant act' occur or be contractually obligated to occur in the United States or the requisite 'direct effect' is lacking." *(Id.* at 5 (citing *Mangyschlakneft Oil,* 33 F.3d at 1237).)

Requiring that "legally significant acts" occur within the United States to establish a jurisdictional footing for a commercial tort claim would seem to overlook the express language of § 1605(a)(2), which speaks of "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" that "causes a direct effect in the United States." As the Fifth Circuit recently observed, "the only act that must be legally significant—that is, give rise to or form the basis of the cause of action—is the act *outside* the United States." *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d at 894 (emphasis in original).[2] The construction urged by the Bank was expressly rejected in *Voest-Alpine,* based on *Weltover:* "this interpretation of the third clause leaves it with no perceivable purpose . . . We are confident Congress did not intend such a meaningless construction of the commercial activity exception and, therefore, decline to adopt the legally significant act requirement under the third clause." *Id.* at 895. This court likewise declines to adopt the Bank's narrower construction of the third clause of § 1605(a)(2).

A closer reading of *Mangyschlakneft Oil* suggests that the Tenth Circuit considered all of the facts in evaluating "direct effect," not merely the "legally significant" acts: *"When all of the facts are examined together in this case, including the 'legally significant*

---

[2] The "act outside the United States" at issue in *Voest-Alpine* was "the Bank of China's failure to pay on a letter of credit it issued," resulting in "a nontrivial financial loss in the United States" to plaintiff, an American corporation. 142 F.3d at 897.

*acts,'* we are compelled to find that the direct effect of the defendants' alleged acts occurred in Europe rather than in the United States." 33 F.3d at 1239 (emphasis added). For the Tenth Circuit, the fact that plaintiff "is an American corporation that suffered a financial loss" by itself was not "sufficient to place the direct effect of the defendants' actions 'in the United States.'" *Id.* The *Mangyschlakneft Oil* case was founded on "a contract entered into by the parties in Moscow . . . [that] called for the defendants to deliver oil from Kazakhstan to Sicily" with payment to be made in London and Paris. Nothing in *Mangyschlakneft Oil* suggests that tortious acts *outside* of the United States cannot have a "direct effect in the United States" within the meaning of § 1605(a)(2).

Here, the acts in question involved direct contacts with the United States far more immediate than a corporate "financial loss," standing alone.[3]

As it stands, the court is persuaded that transferring the $400,000 in question to parties located within the United States had a "direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2). If, as Orient Mineral alleges, the Bank of China's conduct constitutes a commercial tort resulting in the wrongful transfer of those funds, such

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[3] Cases such as *Antares Aircraft* L.P. *v. Federal Republic of Nigeria*, 999 F.2d *33* (2d Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994), are distinguishable for this reason as well.

conduct is embraced within the FSIA's "commercial activity" exception.[4]

**Personal Jurisdiction and "Minimum Contacts"**

As in *Weltover,* a court exercising jurisdiction over as foreign instrumentality under the FSIA must be satisfied that such exercise of jurisdiction satisfies the "minimum contacts" requirements of Due Process

> Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977).

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[4] Of course, the ultimate burden of persuasion on the question of sovereign immunity rests upon the Bank of China. *Voest-Alpine,* 142 F.3d at 896.

*Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 414 (1984) (footnote omitted). Since *Hanson v. Denckla* it has been deemed "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). *Accord, Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474-75 (1985).

Here, the "act by which the defendant purposefully avails itself of the privilege of conducting activities" within this forum, if any, must be the Bank of China's transfer of $400,000 to Zions Bank allegedly for the benefit of Saren Gaowa; the "relationship among the defendant, the forum and the litigation" outlined by Orient Mineral's complaint turns on that event.

The Bank argues that because the $400,000 was transferred from Wil-Bao's account—not Orient Mineral's account—Orient Mineral may be heard to complain only about the original transfer of $3,000,000 of Orient Mineral's funds into the Wil-Bao account, which occurred in the People's Republic of China. This argument raises an interesting question, but one that may not be answerable on the existing record. The court has encountered some difficulty in ascertaining important details of the Chinese law of joint ventures, including whether property of the joint venture is held in the name of the joint venture as a legal entity or in the name of the partners, or whether the partners retain an interest in or control over the money or property of the joint venture. If joint ventures like Wil-Bao are organized as joint stock companies under the Joint Venture Law of China, as one source seems to

suggest,[5] then it may well be that in China, joint venture "property is usually held in the names of the members," as is the case with American joint stock companies. Kenneth W. Clarkson, et al., *West's Business Law: Text, Cases, Legal, Ethical, Regulatory and International Environment* 676 (7th ed. 1998). These legal questions remain unresolved, and the court at this point declines the Bank's invitation to address them.

It may well be that the Bank of China has not yet manifestly availed itself of the privilege of conducting business here by "carrying on. . . a continuous and systematic . . . part of its general business" in Utah, and therefore has not submitted itself to general personal jurisdiction in this District. *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. at 415. Nevertheless, personal jurisdiction may attach at least to the extent of the transaction alleged in plaintiff's complaint. When a court exercises personal jurisdiction over a defendant in a suit directly arising out of or related to the defendant's contacts with the forum, the court is often said to be exercising "specific jurisdiction" over the defendant. *See id.* at 414 n.9; *see also* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv.L.Rev. 1121, 1144-1164 (1966). Based upon the record now before this court, it appears that this court at least may exercise "specific" personal jurisdiction over the Bank of China in this lawsuit based upon its "contacts"

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[5] *People's Republic of China Law Digest,* in MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST CHN-37 to CHN-40 (1997).

represented by the $400,000 transfer. That conduct was "purposefully directed" at particular residents of this forum and plaintiff's alleged injury "arise[s] out of and relate[s] to" that specific conduct. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985).

**Venue**

28 U.S.C.A. § 1391(f)(1) provides that a civil action under FSIA may be brought "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; . . ." Taking the well-pleaded factual allegations of the complaint as true, it seems apparent that "a substantial part" of the $400,000 transferred out of the Wil-Bao account–"the subject of the action" in this case–is "situated" in the District of Utah. Likewise, a "substantial part" of the alleged diversion of $400,000 of Orient Mineral's Wil-Bao investment to Zions First National Bank and then to Saren Gaowa, and Gaowa's alleged exercise of control over those funds for her own benefit–"the events . . . giving rise to the claim"–also "occurred" in the District of Utah. Plaintiff's allegations, if credited by a fact-finder, would be sufficient to establish venue under § 1391(f)(l) in this District. The Bank's conclusory assertions to the contrary that "these events do not support plaintiff's claims against the Bank," (Reply Mem. at 8), simply fail to persuade.

**Service of Process**

28 U.S.C.A. § 1608(b) specifies the manner in which service of process upon an agency or instrumentality of

a foreign state must be accomplished for purposes of the FSIA:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state–
>
> (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served,
>
> or
>
> (C) as directed by order of the court consistent with the law of the place where service is to be made.

Bank of China asserts that plaintiff has failed to effect service of process in any of the ways specified by § 1608(b). Orient Mining responds that personal delivery of "a translated copy of the Summons and Complaint to the Consulate of the Peoples Republic of China located in San Francisco, California . . .complies with the mandates of 28 U.S.C. Section 1608(b)," without further explanation. (Points and Authorities in Support of Plaintiffs Opposition to Motion for Judgment on the Pleadings of Defendant, Bank of China, filed September 8, 1998 (dkt. no.28) ("Opp. Mem."), at 10.) "That delivery," Bank of China replies, "does not satisfy any of the forms of service required under Section 1608." (Reply Mem. at 8.) "Here . . . there was no 'special arrangement,' no delivery to an officer or agent, no Hague Convention service, no letter rogatory, no dispatch by the court clerk, and no court order." (*Id.* at 8.)

Plaintiff does not identify any "special arrangement" or "applicable international convention" that authorizes service of process in the fashion attempted in this case: service of translated copies of the summons and complaint upon the Chinese Consulate in San Francisco. The Consular Convention between the United States and the People's Republic of China, dated February 19, 1982, 33 U.S.T. 2973, T.I.A.S. No. 10209, does not expressly authorize service of process upon the Chinese Consulate as a means for obtaining personal jurisdiction over Chinese agencies or instrumentalities. In *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444 (9th Cir. 1991), *cert. denied*, 506 U.S. 903 (1992), the Ninth Circuit rejected the assertion by a corporation organized under the laws of the People's Republic of

China that the Consular Convention was an "applicable international convention" within the meaning of § 1608(b)(2). The Consular Convention, the court said, "governs the privileges, activities and immunities of consulates and their officers," not the "service of judicial documents." *Id.* at 1448. Nor has the court identified any other "applicable international convention" that would operate to validate plaintiff's chosen method of personal service.

Absent some controlling authority establishing that service upon the consulate was sufficient, the Bank's motion concerning insufficient service of process appears to be well taken. The court is not persuaded that the Bank has waived its objections to service by filing the pleadings it has filed to date.

Orient Mineral alternatively "requests additional time to perfect service of process in accordance with 28 U.S.C. § 1608(b)," citing *Hanil Bank v. PT. Bank Negara Indonesia, (Persero).* (Opp. Mem. at 12.) In *Hanil Bank,* the district court had allowed plaintiff additional time to perfect service of process where service initially was found insufficient. 148 F.3d at 130.[6] Here, the Bank of China did not oppose the

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[6] As the district court explained:

> The Court concludes, however, that the interests of justice will not be served by a dismissal of the Complaint on these grounds where subject matter jurisdiction is appropriate. Defendant and its New York attorneys have long had notice of this lawsuit, and therefore the suit may go forward if Plaintiff perfects service within a reasonable time in accordance with § 1608. See *Finamar Investors*

request for additional time in its reply memorandum. Nor was the matter addressed at the October 16 hearing.

Based upon the existing record, this court concludes that the interests of justice would be served by granting plaintiff an additional thirty (30) days within which to accomplish service of process on the Bank of China consistent with 28 U.S.C. § 1608(b).

Therefore,

**IT IS ORDERED** that the defendant Bank of China's motion for judgment on the pleadings is GRANTED to the extent that it is based upon insufficient service of process: service of the summons upon the Bank of China by delivery to the Chinese Consulate on April 24, 1998, is hereby QUASHED; the Bank of China's motion for judgment on the pleadings is DENIED on all other grounds.

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*Inc. v. Republic of Tadjikistan,* 889 F.Supp. 114, 118 (S.D.N.Y. 1995) (lawsuit preserved by permitting the plaintiff two months to perfect service under FSIA); *First City, Texas Houston, NA. v. Rafidain Bank,* No. 90 Civ. 7360(JSM), 1992 WL 296434, at *2 (declining to dismiss action and giving the plaintiff reasonable time to cure defective service under FSIA); *Lippus v. Dahlgren Mfg. Co.,* 644 F.Supp. 1473 (E.D.N.Y. 1986) (denying motion to dismiss action due to improper service and permitting the plaintiff 30 days to perfect service under FSIA).

*Hanil Bank v. PT. Bank Negara Indonesia, (Persero),* Civil No. 96 Civ. 3201, 1997 WL 411465, at *4 (S.D.N.Y. July 18, 1997).

**IT IS FURTHER ORDERED** that plaintiff is granted THIRTY (30) DAYS from the entry of this order within which to effect service of process upon the Bank of China pursuant to 18 U.S.C. § 1608(b); if service is not accomplished within that time, the complaint shall be deemed DISMISSED as against the Bank of China, without prejudice.

DATED this 19th day of July, 1999.

BY THE COURT:
/s/
BRUCE S. JENKINS
United States Senior District Judge

# APPENDIX G

## STATUTES AND REGULATIONS

TITLE 28 -JUDICIARY AND JUDICIAL PROCEDURE
PART IV -JURISDICTION AND VENUE
CHAPTER 85 -DISTRICT COURTS; JURISDICTION

### 28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

TITLE 28 -JUDICIARY AND JUDICIAL PROCEDURE
PART IV -JURISDICTION AND VENUE
CHAPTER 87 - DISTRICT COURTS; VENUE

**28 U.S.C. § 1391. Venue generally**

* * *

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought —

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

# TITLE 28 -JUDICIARY AND JUDICIAL PROCEDURE
# PART IV -JURISDICTION AND VENUE
# CHAPTER 97 -JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

## 28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

## 28 U.S.C. § 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

**28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

**28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

. . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * *

**28 U.S.C. § 1606. Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought

**28 U.S.C. § 1607. Counterclaims**

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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No. 07-1095

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IN THE

# Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,

*Petitioners,*

*v.*

BANK OF CHINA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Whether certiorari should be denied where the Petition seeks review of an interlocutory judgment of the Tenth Circuit but makes no attempt to show that review is necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause," and where in any event, no such showing can be made.

II. Whether certiorari should be denied where there is no circuit conflict presented by the various circuits' application of the exceptions to foreign sovereign immunity set forth in 28 U.S.C. § 1605(a)(2), or *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), that would impact the outcome of this case.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Bank of China (the "Bank") is a corporation organized and existing under the laws of the People's Republic of China.

Until 2004, the Bank was wholly owned by the People's Republic of China. On or about August 26, 2004, the Chinese government converted the Bank into a joint stock company, and the Bank became Bank of China Limited.

Bank of China Limited's majority owner is Central SAFE Investment Limited. No publicly held company owns 10 percent or more of Bank of China Limited's stock.

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## JURISDICTIONAL STATEMENT

While 28 U.S.C. § 1254(1) gives this Court discretion to exercise its certiorari jurisdiction over the Tenth Circuit's interlocutory judgment, Petitioners fail to show that this case presents the extraordinary circumstances typically required for such review. *See Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). As is discussed in greater detail *infra* at pp. 11-13, this case in fact presents none of the indicia that warrant exercise of this Court's certiorari jurisdiction to review an interlocutory ruling.

## STATEMENT OF THE CASE

### I. Yue's Embezzlement

This case, part of which still is being litigated below, arises from the loss by Orient of its investment in the Wil-Bao gold mining venture in China, due to Petitioners' own negligence and mismanagement and due to the criminal misconduct of its director, Yue Xiaocun (a/k/a David Yue).

In 1996, Orient partnered with a Chinese company to form Wil-Bao Mineral Co., Ltd. ("Wil-Bao"), a joint venture whose purpose was to mill and mine gold in the Lingbao area in Henan Province, China. (Opinion, Pet. App. 4a). Orient obtained $3 million in funding for the venture from a wealthy investor, R. Ellsworth McKee. (Wil-Bao Board Resolution, 1a; Opinion, Pet. App. 5a).

On May 14, 1996, Yue informed the sub-branch of Respondent Bank of China ("the Bank") in Lingbao, China, that it would receive a wire transfer of $3 million

and requested an account number for the transfer. The Bank provided a letter giving wire-transfer instructions and a temporary account number to be used for the transfer. (District Court's Findings of Fact & Conclusions of Law (hereafter, "FF/CL"), 14a; Opinion, Pet. App. 7a). The Bank also stated that it would keep the funds safe pending the arrival of Orient's representative. (*Id.*). Yue faxed a copy of the Bank's letter to Art Wilson, Orient's Chairman of the Board, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 3a, 8a). On May 21, 1996, McKee arranged for $3 million to be transferred from his bank in Georgia to the Bank's Lingbao sub-branch, China; it was routed through the Bank's New York branch. (FF/CL, 17a; Opinion, Pet. App. 9a).

On May 24, Wil-Bao's board of directors passed a resolution that, among other things, authorized Jones to approve any expenditure over $25,000. (Resolution, 5a; FF/CL, 17a; Opinion, Pet. App. 6a). The Wil-Bao board resolution did not contain any reference to the Bank or to disbursements or disposition of funds from any account at the Bank, nor did it bear any indicia of corporate authority. (Resolution, 4a-5a; FF/CL, 26a-27a).

Early in the morning of May 27, 1996, the Lingbao sub-branch received the $3-million transfer and placed those funds in a temporary account. (FF/CL, 35a-36a). Later that morning, four representatives of Orient and Wil-Bao, including Preston Jones, Art Wilson, F. Thomas Eck III, and David Yue, came to the Bank to open U.S. dollar and local currency accounts for Wil-Bao. The four representatives met with officers of the Bank's sub-branch. (*Id.*, 36a; Opinion, Pet. App. 9a-10a). The Bank's officers did not speak or understand English, and Jones, Eck, and Wilson did not speak or understand Chinese. Yue, who was

a director of both Petitioners, acted as the sole translator during the meeting, at Petitioners' request and desire. (FF/CL, 18a-19a; Opinion, Pet. App. 10a).

Petitioners' representatives presented the Bank with a letter from Orient dated May 16, 1996, and with a Resolution by Orient's Board of Directors. The Resolution stated that Jones was to have sole and exclusive authority concerning disposition of the $3 million. (Orient Board Resolution, 1a-2a; FF/CL, 16a; Opinion, Pet. App. 8a-9a). It also provided that Orient would indemnify and hold harmless the Bank "from all claims or liabilities of any kind whatsoever," as long as the Bank followed Jones's instructions. (Resolution, 1a; FF/CL, 15a-16a). These were formal documents bearing corporate seals. (FF/CL, 16a; Opinion, Pet. App. 10a). Given their formal appearance, a bank clerk translated the written documents. (Opinion, Pet. App. 10a). Yue confirmed that the documents designated Jones as the authorized person to dispose of the funds. The May 24, 1996 Wil-Bao Board Resolution was not provided to the Bank during the May 27 meeting. (Wil-Bao Board Resolution, 4a-5a; FF/CL, 18a; Opinion, Pet. App. 9a).

Based on the written translation and what Yue told the Bank officers, the Bank prepared Wil-Bao's account opening documentation for a U.S. dollar account and a local currency account, as well as a slip to transfer the $3 million from the temporary account into Wil-Bao's U.S. dollar account. (Opinion, Pet. App. 11a). Jones, as Orient's designated representative, signed the transfer slip. (*Id.*). The account documentation included three required signatories, none of whom was Jones. No limitations were placed on the accounts. (FF/CL, 27a; Opinion, Pet. App. 11a).

During the following months, Wil-Bao directed the Bank to make transfers of funds from the Wil-Bao accounts, without Jones's knowledge or authorization. (Opinion, Pet. App. 13a). These transfers included three transfers from Wil-Bao's U.S. dollar account to the United States, including the transfer at issue in this case, for $400,000 to defendant Saren Gaowa in Utah. (FF/CL, 19a, 31a-32a; Opinion, Pet. App. 13a). The District Court found that the Bank acted properly, in accordance with the request of its customer, Wil-Bao, in processing the transfer requests, and that the transfer slips bore the required three seals. (FF/CL, 31a-32a). The three transfers were routed from the Bank's Lingbao sub-branch to the designated bank in the United States and through the Bank's New York branch. (Opinion, Pet. App. 39a).

Over time, the funds in Wil-Bao's accounts were depleted, and the Wil-Bao joint venture failed. (Opinion, Pet. App. 13a-15a). David Yue was arrested in China, tried, and found guilty of embezzlement. (*Id.*, Pet. App. 15a).

## II. Deficiencies in Petitioners' Recitation of the Facts

Petitioners' Statement of the Case misstates numerous important facts – in many instances, in a manner directly contrary to findings made by the District Court and affirmed by the Tenth Circuit. By way of example:

- Petitioners intimate that the Bank sent the May 14, 1996 letter to Orient in Nevada. (Pet. 4). In fact, as the lower

courts both found, the Bank provided this letter (written in Chinese) to Yue in *China*; Yue then transmitted the letter to Art Wilson, Orient Mineral's chairman, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 39a). The distinction is critical, since the Tenth Circuit specifically found that the relevant inquiry was whether that act taken outside the United States had a "direct effect" within this country – and the court held that it did not. (Opinion, Pet. App. 39a).

- The Petition incorrectly states that "Orient wired $3 million to [the Bank's] New York branch, for transmittal to its branch in Lingbao, China." (Pet. 5). In fact, Orient's investor, R. Ellsworth McKee, initiated a wire transfer from his account in Georgia to the Lingbao sub-branch in China; unbeknownst to McKee, Wachovia happened to route the funds through the Bank's New York branch. But the transfer did not involve $3 million wired "to the New York branch" – both the District Court and Tenth Circuit correctly found that that the wire transfer was to the sub-branch in Lingbao. (FF/CL, 17a; Opinion, Pet. App. 9a).

- Petitioners incorrectly state that Jones at the May 27, 1996 meeting submitted the Wil-Bao board resolution concerning his authority to approve

*disbursements* over $25,000. (Pet. 5). In fact, the District Court specifically found that the Wil-Bao board resolution, which concerned *expenditures* over $25,000 and did not refer to the Bank in any way, was provided to the Bank on May 29, 1996 – two days after the Wil-Bao accounts were opened. (FF/CL, 25a). The Tenth Circuit affirmed the District Court's holding that the board resolution and its $25,000 limitation did not form part of Wil-Bao's contract with the Bank. (FF/CL, 31a-32a; Opinion, Pet. App. 47a-48a).

- The Petition incorrectly states that Yue sent $400,000 to the Bank's New York branch. (Pet. 5). In fact, Yue initiated a wire transfer on behalf of Wil-Bao that included its three required seals. This transfer was to Saren Gaowa's bank account in Utah, and the funds were routed through the Bank's New York branch. (FF/CL, 19a). It was this transfer alone that the District Court found was a commercial activity overseas that caused a direct effect in the United States under the third prong of the commercial activity exception (and which, it ultimately held, did not constitute a breach of contract). (FF/CL, 31a-32a).

## III. Procedural Background

Orient filed this action against the Bank in 1998, alleging breach of contract and a variety of tort claims, and seeking to recover the $3 million McKee invested, as well as lost profits anticipated from the joint venture. In May 2001, Wil-Bao joined as a co-plaintiff. At the time the suit was filed, the Bank was a foreign corporation owned by the government of China, and it is undisputed that under the Foreign Sovereign Immunities Act ("FSIA"), it was immune from the subject-matter and personal jurisdiction of U.S. courts unless one of the exceptions to FSIA immunity applied. *See* 28 U.S.C. § 1604.

Soon after the action was filed, the Bank moved for judgment on the pleadings based on lack of subject-matter and personal jurisdiction. The District Court ruled that there was probable jurisdiction under the "direct effect" (third) clause of the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), limited solely to the single $400,000 transfer from Wil-Bao's account to Gaowa in Utah. (Memorandum Opinion and Order, Pet. App. 114a-133a). The Bank appealed the finding of probable jurisdiction; Orient – which at that point was the only plaintiff – did not appeal the District Court's limitation of jurisdiction.

The Tenth Circuit directed Orient to show that it had made valid service on the Bank. When Orient failed to do so, the court remanded the case with directions that the District Court vacate that part of its ruling finding probable jurisdiction and resolve the service-of-process issue. (Order and Judgment, Pet. App. 106a-

113a). The parties continued to litigate, and Petitioners in 2004 sought a writ of mandamus to remove the trial judge, but their request was denied. (Order,, Pet. App. 103a-105a).

Following a 13-day bench trial, the District Court in early 2005 entered its 235-page Findings of Fact and Conclusions of Law, including its rulings on various pending motions. (FF/CL, excerpts at 7a-32a). The District Court found that it had jurisdiction only as to Petitioners' claims relating to the $400,000 transfer, for which the third prong of the FSIA's commercial activity exception provided jurisdiction, and that none of Petitioners' other claims fell within any exception. (FF/CL, 28a-32a). As to Petitioners' claims relating to the $400,000 transfer, the District Court dismissed them on the merits. The following day, the District Court entered its Judgment and Order of Dismissal, Judgment, District Court R. 339, and later entered an order dismissing the Bank's counterclaim for indemnification for attorneys' fees. Order, District Court R. 363.

The parties each appealed portions of the District Court's rulings. Petitioners argued that all three clauses of 28 U.S.C. § 1605(a)(2) provided jurisdiction over each of their claims, asserted that the District Court made clear errors in its findings of fact and asked the Tenth Circuit to make its own findings and remand the case to a different judge. The Bank cross-appealed, asserting that the FSIA did not provide jurisdiction over Petitioners' claims relating to the $400,000 transfer. It also appealed the District Court's dismissal of its counterclaim for indemnification.

The Tenth Circuit affirmed the dismissal of Petitioners' claims. (Opinion, Pet. App. 1a-58a). It found that the FSIA did not give the District Court jurisdiction over the claims (other than the ones relating to the $400,000 transfer) since they were not based upon either commercial activity by the Bank in the United States, or upon an act within the United States in connection with the Bank's commercial activity elsewhere. (*Id.*, Pet. App. 20a-42a). With regard to the claims relating to the $400,000 transfer, the Tenth Circuit affirmed their dismissal on the merits. (*Id.*, Pet. App. 42a-53a). Significantly, the Tenth Circuit rejected Petitioners' challenge to the District Court's factual findings, holding that "the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a).

The Tenth Circuit also reversed the District Court's dismissal of the Bank's counterclaim for indemnification and remanded with specific instructions that the District Court consider the merits of that claim:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys'

fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).[1]

Following issuance of the Tenth Circuit's Opinion, the case continues to be litigated in the District Court. The Bank in March 2008 filed an Amended Counterclaim for Indemnification, and as of this writing, Orient and the members of its board of directors have pending motions to dismiss that counterclaim. (Amended Counterclaim, 33a; Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counterclaim Defendants' 4/16/08 Motion to Dismiss, 44a).

Petitioners now seek this Court's review of part of the Tenth Circuit's Opinion.

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[1] Given that it had affirmed the District Court's dismissal of all of Petitioners' claims, the Tenth Circuit declined to address Petitioners' request that the case be remanded to a new judge. (Opinion, Pet. App. 53a). However, while its ruling reviving the Bank's counterclaim necessarily would result in further proceedings on remand, the Tenth Circuit specifically noted that Petitioners' had failed to make the same request for a new judge on remand in Appeal No. 05-4220, the Bank's appeal as to its counterclaim. (Opinion, Pet. App. 57a). Accordingly, proceedings on remand are again before Judge Jenkins, who is intimately familiar with the extensive facts and legal background of the case.

## REASONS FOR DENYING THE PETITION

### I. The Tenth Circuit's Interlocutory Judgment Provides No Basis for Invoking This Court's Certiorari Jurisdiction at This Time.

While 28 U.S.C. § 1254(1) gives this Court discretion to review non-final judgments of the Federal circuit courts, the Court generally awaits final judgment before exercising its certiorari jurisdiction. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari), *citing Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893), and *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Ry. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also* Gressman, Geller et al., SUPREME COURT PRACTICE, § 4.18, pp. 280-81 (9th ed. 2007). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted) (lack of finality in a lower-court decree "of itself alone furnished sufficient ground for the denial of the application").

The Tenth Circuit's Opinion is undeniably interlocutory. After the District Court's rulings collectively disposed of all of Petitioners' claims and the Bank's counterclaim, the Tenth Circuit affirmed the former decisions, but reversed the dismissal of the Bank's counterclaim for indemnification and remanded the case for further proceedings. (Opinion, Pet. App.

57a-58a). The Tenth Circuit discussed in detail the issues the District Court is to resolve on remand:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys' fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).

Thus, while the District Court's ruling was final in terms of disposing of all the claims of all the parties, the Tenth Circuit's opinion is decidedly *non*-final and is not ripe for review. Indeed, the matter currently is being litigated below. The Bank in March 2008 filed its Amended Counterclaim for Indemnification, seeking its costs of defense in this decade-old litigation that by now are in excess of $900,000. (Amended Counterclaim, 33a). Petitioners have filed various motions to dismiss the counterclaim that remain pending as of this writing. (Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counter-Claim Defendants' 4/16/08 Motion to Dismiss, 44a). In short, Petitioners seek review by this Court of a matter they are actively litigating in the District Court.

This is the identical context in which *Brotherhood of Locomotive Firemen & Enginemen* came to this Court. In that case, the District Court entered final remedies in the form of injunctive relief and contempt orders, but the Court of Appeals, after reviewing, remanded for further analysis of various contempt-related issues. Rejecting the petition for certiorari, this Court noted that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." 389 U.S. at 328, *citing Hamilton-Brown Shoe Co.*, 240 U.S. at 257-58. The same can be said here, and, as was the case with *Brotherhood of Locomotive Firemen & Enginemen*, this matter is not ripe for this Court's review.

This Court long has required a heightened showing before granting certiorari for an interlocutory judgment, requiring that immediate review be "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co.*, 148 U.S. at 384. Petitioners, however, have failed even to acknowledge that the Tenth Circuit's judgment is interlocutory, much less discussed why review is needed to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." Doubtless, that is because they cannot meet that standard. This case is a decade old, and Petitioners can point to no "extraordinary inconvenience," nor any other factor sufficient to require immediate review by this Court.

## II. The Petition Offers Nothing That Warrants Review by This Court.

### A. Petitioners Merely Quibble with the Lower Courts' Factual Determinations and Accurate Application of the FSIA's Plain Text and This Court's Precedents Interpreting It.

At its core, the Petition seeks simply to have this Court replicate the extensive analysis conducted by both lower courts of the voluminous factual record from the 13-day bench trial. For instance, Petitioners complain that the District Court "disregarded" certain facts in the course of its 235-page findings and opinion. (Pet. 9). But Petitioners fully aired their challenge to the District Court's factual findings in the Tenth Circuit, which rejected them out of hand "because the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a). Even had factual errors occurred below – which they did not – they plainly do not warrant the grant of certiorari under Rule 10.[2]

Likewise, the Petition asserts that the Tenth Circuit misapplied properly stated legal rules. Petitioners complain about the Tenth Circuit's "literal approach" to the FSIA (Pet. 17-27), without acknowledging that, in interpreting the FSIA (as with any statute), this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (citation

[2] The District Court did not "disregard" any "determinative" facts – the "disregarded" facts that Petitioners cite (Pet. 9) had nothing to do with this case.

omitted). Petitioners then survey the varying circuits' pre-*Nelson* analyses of the first clause of 28 U.S.C. § 1605(a)(2) and argue that, while the Tenth Circuit correctly cited the applicable rule from *Nelson*, it misapplied that rule. (Pet. 20-21). Again, even assuming that Petitioners' charge were correct, which it is not, the mere misapplication of a properly stated rule of law does not justify the grant of certiorari. Rule 10.

Petitioners in the end offer nothing beyond their unhappiness with the Tenth Circuit's ruling. But a litigant's mere displeasure falls far short of the "compelling reasons" required to justify the grant of certiorari.

### B. The Four-Way Circuit Split Touted by Petitioners Is Illusory and, Even If It Exists, By Petitioners' Own Admission Predates *Nelson* and Is of No Meaningful Import to FSIA Jurisprudence.

Petitioners assert a four-way conflict among the circuits in interpreting the first clause of the commercial-activity exception, 28 U.S.C. § 1605(a)(2). Specifically, they argue that the Tenth Circuit improperly held that the wrongful act by the foreign state has to have occurred in the United States in order to satisfy the first clause. (Pet. 20). But no such conflict exists, and their position is based in large part on their own misinterpretation of the applicable law, and of the facts as found and affirmed by the lower courts.

1. The Petition asserts repeatedly and prominently that the Tenth Circuit decision is part of a "widening

conflict" among the circuits (Pet. i) (Questions Presented), and **"completes a four-way circuit split,"** (Pet. 17) (point heading) (bold in original). But elsewhere it admits that the purported conflict in fact predates *Nelson*. (Pet. 19). The cases on which Petitioners base their claim of circuit conflict clearly bear that out. (Pet. 17-21, *citing, inter alia, Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983), *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980), *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) and *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). Even if the differences among those decisions amounted to genuine distinctions in interpreting the first clause of 28 U.S.C. § 1605(a)(2), which they do not, Petitioners offer no explanation of how another ruling from this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve.

2. In point of fact, the Tenth Circuit faithfully applied *Nelson*. Contrary to Petitioners' assertion that the question is whether the Bank's entire "course of conduct . . . cumulatively had substantial contact with the United States," (Pet. 23), *Nelson* set the analytical starting point as "identifying the *particular* conduct on which the [plaintiffs'] action is 'based' for purposes of the Act." 507 U.S. at 356-57 (citations omitted) (emphasis added). *Nelson* went on to hold that, in determining which conduct forms the basis for plaintiff's claim, the statutory phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citations omitted).

The Tenth Circuit conducted that exact analysis in finding that none of Petitioners' claims are "based upon" the Bank's commercial activity in the United States for purposes of the first clause. (Opinion, Pet. App. 24a-31a). Petitioners try to evade that language by claiming that it "addressed only whether the activity was sovereign," (Pet. 23), but that misreads *Nelson*. Though *Nelson* ultimately found that the specific conduct by Saudi Arabia on which plaintiff's claim was based – exercise of its police power through which it allegedly tortured plaintiff – was sovereign, and not commercial, nothing in *Nelson* restricts that language in the manner Petitioners assert. To the contrary, this Court specifically made those statements in the context of defining the term "commercial activity" as used in the FSIA:

> If [28 U.S.C. § 1603(d)] is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined. . . . We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act. [507 U.S. at 358-59 (internal citations omitted)].

Tellingly, Petitioners criticize the Tenth Circuit for failing to follow the Fourth Circuit's analysis in *Nelson*, (Pet. 23-25) – a ruling that this Court reversed. 507 U.S. at 363. They also cite other circuits that, like the Tenth

Circuit, have faithfully applied *Nelson*. (Pet. 23-25, *citing Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004) and *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007)). This demonstrates plainly that *Nelson* is being properly applied by the lower courts, including the Tenth Circuit, and does not need to be revisited.

3. To the extent Petitioners assert a circuit conflict between the Tenth Circuit's ruling and other post-*Nelson* cases, their assertion is internally inconsistent and incorrect. Petitioners cite the Tenth Circuit's Opinion and the Second Circuit's ruling in *Kensington Int'l* as examples of instances in which courts "routinely depart from the language and intent of the Act. . . ." (Pet. 15). Elsewhere, however, they portray the Tenth Circuit's ruling as "the first time that any court of appeals has applied a 'literal' interpretation to clause one of the exception, to deny jurisdiction over the action of a U.S. citizen [*sic*] based upon commercial activity of a foreign state which had substantial contact with the United States." (Pet. 12). Petitioners cannot have it both ways, and in arguing that certiorari is warranted both because the Tenth Circuit applied the first clause literally, and because it departed from the statutory language, Petitioners' position is fundamentally inconsistent.

It also is incorrect, since there is no post-*Nelson* circuit split on any issue germane to the one presented by this case. The various cases that Petitioners cite as

establishing a circuit conflict either are factually inapposite or actually support the Bank:

- In *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969, 971, 973-74 (9th Cir. 1998) (Pet. 20), the Ninth Circuit held that the foreign state engaged in commercial activity in the United States by entering into an agreement in the United States; the alleged wrongful act was the breach of that agreement. Here, in contrast, the Tenth Circuit found that certain actions of the Bank were taken *in China*, not in the United States, and that the Bank's lone action that could be deemed to constitute carrying on commercial activity here – its operation of a branch in New York City – was not an activity upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). *Theo. H. Davies & Co.* does not conflict with the Tenth Circuit's ruling.

- Petitioners portray *Kensington Int'l* as one of four variants among the circuits in interpreting *Nelson*, (Pet. 19-21), but it in fact constitutes a straightforward application of *Nelson*. In the passage on which Petitioners rely (Pet. 20), the Second Circuit merely held that in construing whether plaintiff's action is "based upon" the foreign state's commercial activity carried on in the United States, something more than "but

for" causation is required – the "degree of closeness" between the commercial activity and the gravamen of plaintiff's complaint must be considered. 505 F.3d at 155, *citing Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000). Rejecting plaintiff's argument that it met its burden under the first clause because oil was shipped to the United States and payments made to a New York bank, the Second Circuit noted that those activities, while concededly in the United States, were not the basis of plaintiff's claim. Rather, the gravamen of plaintiff's claim was that the foreign state tried to thwart plaintiff's ability to collect a debt by entering into a prepayment agreement with a bank, which was not commercial activity in the United States. The same holds true here: the Bank concedes that its maintenance of a New York branch constitutes commercial activity, but that activity has nothing to do with the gravamen of Petitioners' claims. *Kensington Int'l* supports the Bank.

- In *Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005) (Pet. 26), defendant airline sold a plane ticket to plaintiff in the United States. Applying *Nelson*, the D.C. Circuit held that because that commercial activity was necessary to

plaintiff's tort claim, the claim was "based upon" that commercial activity, and jurisdiction was appropriate. *Id.* Likewise, in *Globe Nuclear Servs.*, the Fourth Circuit followed *Nelson* in "precisely identify[ing] the conduct by [the foreign state] upon which [plaintiff's] lawsuit is based." 376 F.3d at 285. The court determined that plaintiff's claim was based upon the foreign state's entry into a contract to supply plaintiff with uranium hexafluoride and the foreign state's subsequent repudiation of that contract: the contract called for the foreign state to transfer title to uranium hexafluoride that was located within the United States, and the foreign state served its notice of termination of the contract upon the plaintiff in Maryland. Therefore, the foreign state's conduct had "substantial contact" with the United States and fit within the first clause of the commercial activity exception.

Both *Kirkham* and *Globe Nuclear Servs.* show that, notwithstanding Petitioners' alarmism, court decisions under the FSIA are not depriving citizens of "normal legal redress against foreign states," contrary to the Act's purposes. (Pet. 34 (*citing* House hearings on FSIA)). To the contrary, the courts are faithfully applying the Act, and allowing suits to proceed where the specific conduct on which the

gravamen of plaintiff's claim is based meets the statutory test. Here, it plainly does not.

- Finally, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (Pet. 21), is inapposite because the Fifth Circuit in that case never reached the issue of whether the Bank's conduct satisfied the first clause. Petitioners' argument that the Fifth Circuit "nearly" applied a "literal standard" in contravention of *Nelson*'s teachings, is misplaced.

### C. The Tenth Circuit's Ruling Is a Correct Interpretation of the Statutory Text and This Court's Precedents.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the FSIA, a foreign state is presumptively immune from the jurisdiction of the United States courts, and unless a specified exception applies, a Federal court lacks subject-matter jurisdiction over a claim against it. *Nelson*, 507 U.S. at 355; *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); 28 U.S.C. § 1604. Petitioners argued that all three clauses of the commercial activity exception provide jurisdiction, but the Tenth Circuit held that, with one exception, they did not. (Opinion, Pet. App. 1a). Petitioners fail to demonstrate any error in that ruling.

Petitioners err in arguing that the lower courts ignored the "substantial contact" component of 28 U.S.C. § 1603(e), which defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." Petitioners assert that the "'substantial contact' standard contained in 28 U.S.C. § 1603(e) has never been interpreted by this Court," and that as a result, "no consistent test has emerged for applying this fundamental standard." (Pet. 14). But they fail to note that this case would not give this Court a vehicle with which to interpret that statutory provision.

Consistent with both the plain statutory language and common sense, the Tenth Circuit found that nearly all of the acts complained of by Petitioners – the Bank's provision of the May 14, 1996 letter to Yue in China and its subsequent receipt of the two Orient Mineral documents in China; its wiring of funds through its New York branch or its transfer of $400,000 in Wil-Bao funds to the bank in Utah – did not involve commercial activity in the United States upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). As such, the "substantial contact" component of 28 U.S.C. § 1603(e) is irrelevant: because a claim must be "*based upon* [1] commercial activity carried on in the United States by the foreign state" (emphasis added), which in turn requires *both* "commercial activity carried on by such state" and that that activity have a "substantial contact" with the United States, the fact that Petitioners' claims are based upon commercial activity in China is dispositive. No amount of judicial parsing or

interpretation of the "substantial contact" clause of 28 U.S.C. § 1603(e) would change the outcome in any way.[3]

The Tenth Circuit also correctly held that Petitioners cannot satisfy the second and third clauses of the commercial activity exception, which extend jurisdiction based upon "an act performed in the United States in connection with commercial activity of the foreign state elsewhere" or an action outside the United States "in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). (Pet. App. 32a-42a). As the court properly noted, Petitioners did not satisfy this requirement because their case was not based upon any act of the Bank in the United States. (*Id.*). At most, the Bank's transmission of the $400,000 from China to Utah was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States," thereby satisfying the third clause – but Petitioners' other allegations do not meet the statutory test.

Petitioners would have the FSIA analysis begin and end with "opening the courthouse doors" to parties such

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[3] Contrary to Petitioners' claim that the Bank breached its contract with them by not placing a restriction on the Wil-Bao account, (Pet. 24), the District Court concluded that there was no $25,000 restriction placed on the Wil-Bao account and that therefore, the Bank did not breach its contract with Wil-Bao. (FF/CL, 30a-32a). The District Court also found that the Bank did not breach its contract with Orient. (*Id.*, 29a-30a). The Tenth Circuit affirmed these determinations. (Opinion, Pet. App. 46a).

as themselves. (Pet. 31). Instead, the analysis should focus on the text of the 28 U.S.C. § 1605(a)(2) as it applies to the detailed factual findings made by the District Court. The Tenth Circuit correctly found that, with one exception, the statutory text does not provide jurisdiction over Petitioners' claims against the Bank.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — LETTER FROM ORIENT MINERAL CO. TO BANK OF CHINA DATED MAY 16, 1996

*ORIENT MINERAL CO.*
*P.O. Box 20460*
*Carson City, Nevada 89721*
*Phone: 702-882-0700/Fax: 702-882-0790*

May 16, 1996

Bank of China
Lingbao City of HeNan Province
P.R.C.

Gentlemen:

Enclosed you will find a resolution of Orient Mineral Company, a corporation duly formed and organized under the laws of the State of Nevada, U.S.A., authorizing Preston Jones, a member of the Board of Directors, as the sole and exclusive agent of Orient Mineral Company, to approve, direct, or otherwise designate the funds on deposit with you pursuant to wire transfer from R. Ellsworth McKee and deposited in your account for the benefit of Orient Mineral Co. and the Wilbao Joint Venture.

Please be advised that by this letter the said resolution is confirmed and ratified in all respects and that Preston Jones shall have full and complete authority with regard to the disposition of said funds.

Sincerely yours,

s/ F. Thomas Eck, III
F. THOMAS ECK, III
President, Orient Mineral Co.

*Appendix A*

## RESOLUTION

Resolution of Board of Directors of Orient Mineral Co. as Orient Mineral Co. is presently in the process of receiving approximately $3,000,000, U.S., to be deposited into the Bank of China, Lingbao Branch of HeNan Province, and

WHEREAS, it is the desire of the Board of Directors that the disposition of said funds be controlled by one person, and

WHEREAS, it is the condition of the receipt of said funds that said person shall be Preston Jones, a member of the Board of Directors;

NOW, THEREFORE, BE IT RESOLVED that Preston Jones shall be the sole and exclusive person to act on behalf of Orient Mineral Co. with respect to the disposition of all funds deposited in the Bank of China, Lingbao Branch of HeNan Province; and

BE IT FURTHER RESOLVED that the Board of Directors confirms and ratifies all such dispositions by said Preston Jones; and

BE IT FURTHER RESOLVED that the Board of Directors and Orient Mineral Co. shall hold the Bank of China harmless from all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China.

*Appendix A*

Dated this 16th day of May, 1996.

s/ F. Thomas Eck, III
F. THOMAS ECK, III
President, Orient Mineral Co.

ATTEST:

s/ Pauline Smith
Secretary (ACTING)

[CORPORATE SEAL]

## APPENDIX B — WIL-BAO BOARD RESOLUTION DATED MAY 24, 1996

### SPECIAL MEETING OF THE BOARD OF DIRECTORS WIL 'BAO MINERAL LIMITED LIABILITY COMPANY MAY 24, 1996

BY A UNANIMOUS VOTE OF THE BOARD OF DIRECTORS OF THE HENAN WIL 'BAO MINERAL LIMITED LIABILITY COMPANY JOINT VENTURE, AN EMERGENCY MEETING WAS HELD ON MAY 24, 1996. THE FOLLOWING RESOLUTION WAS ADOPTED:

BE IT RESOLVED: THAT THE BOARD OF DIRECTORS HAS ACCEPTED FUNDING FROM MR. ELLSWORTH MCKEE IN THE AMOUNT OF $2.9 MILLION US DOLLARS AND HAS AGREED THAT REPAYMENT OF THE LOAN BE MADE DIRECTLY TO ELLSWORTH MCKEE ACCORDING TO THE FOLLOWING CONDITIONS:

A. ONE HUNDRED PER CENT (100%) OF THE DISTRIBUTABLE PROFITS WILL BE APPLIED TO THE REPAYMENT OF THE LOAN UNTIL SUCH TIME AS THE LOAN INCLUDING ACCRUED INTEREST IS PAID IN FULL AND

B. AFTER SUCH TIME THE LOAN IS REPAID, MR. MCKEE WILL RECEIVE AS A COMMISSION THE AMOUNT OF

*Appendix B*

$333,333.33 US DOLLARS PER YEAR FOR THREE CONSECUTIVE YEARS, IS REPAID.

BE IT FURTHER RESOLVED THAT UNTIL ALL SAID SUMS ARE REPAID IN FULL PRESTON JONES SHALL BE APPOINTED AS THE DIRECTOR OF WIL 'BAO RESPONSIBLE FOR THE MANAGEMENT OF THE FINANCIAL AFFAIRS OF WIL 'BAO WITH SOLE AUTHORITY TO APPROVE ANY EXPENDITURES OF WIL 'BAO IN EXCESS OF $25,000 US DOLLARS.

BE IT FURTHER RESOLVED THAT ALL PRESENT MEMBERS OF THE BOARD OF DIRECTORS SHALL REMAIN APPOINTED FOR A PERIOD OF NOT LESS THAN ONE YEAR FROM THIS DATE UNLESS SAID BOARD MEMBER RESIGNS OR IS REMOVED FOR CAUSE.

THERE BEING NO FURTHER BUSINESS TO DISCUSS, THE MEETING WAS ADJOURNED.

DATED MAY 24, 1996, LING BAO CITY, PRC

s/ Li Jan Qiang
LI JAN QIANG,
VICE CHAIRMAN

s/ Zhang Fang Xing
ZHANG FANG XING,
DIRECTOR AND VICE
GENERAL MANAGER

*Appendix B*

s/ Zhao Zhixiang
ZHAO ZHIXIANG,
DIRECTOR AND JIAOCUN
TOWN MAYOR

s/ Art Wilson
ART WILSON, CHAIRMAN

s/ Xiaoqun Yue
XIAOQUN YUE,
DIRECTOR AND GENERAL
MANAGER

s/ F. Thomas Eck, III
F. THOMAS ECK, III,
DIRECTOR

s/ Preston Jones
PRESTON JONES,
DIRECTOR

## APPENDIX C — EXCERPTS FROM DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED JANUARY 26, 2005

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

Civil No. 2:98-CV-238J

ORIENT MINERAL COMPANY, and
WIL-BAO MINERAL CO., LTD.,

Plaintiffs,

vs.

BANK OF CHINA, DAVID YUE aka
YIAOQUN YUE, and SAREN GAOWA,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW (FED. R. CIV. P. 52(a)) AND ORDER RE: PENDING MOTIONS**

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* * *

59. On May 14th (in China, the same day), Yue contacted the Bank's Ling Bao Sub-branch, stated that certain funds would be transmitted from Orient to the Bank, and requested an account number to which the funds could be wired. (Tr. 4/20/04, at 60:2-23, 86:13-88:9 (Mme. Liu).)

60. In response to Yue's request, the Bank provided a letter dated May 14, 1996, giving wire transfer routing instructions and an account number ("ORIENT MINERAL CO., Account No. 14833") to be used for the transfer and stating that the Bank would keep the funds safe pending the arrival of Orient Mineral's representative. (PX-5; PX-6; Transcript of Trial, dated April 20, 2004 ("Tr. 4/20/04"), at 61:9-62:23, 87:20-89:12 (Mme. Liu).[18])

61. On or about May 15, 1996, Jones received copies of a letter addressed to Wilson from Yue (PX-7), reciting that the bank "agreed [to] our application in temporary, special holding account for Orient Mineral Co. that has been set up by me in [the] LingBao Branch today" to receive the US$ 3 million transfer, together with the bank's May 14th letter (PX-5) and a handwritten

---

18. According to Mr. Wilson, Mme. Liu's May 14th letter "was received first by David Yue and immediately passed on to Orient Mineral," presumably referring to Wilson himself. (Transcript of Trial, dated April 15, 2004, at 117:16-23 (Mr. Wilson); *see* Tr. 4/20/04, at 62:4-5 (Mme. Liu) ("I gave [the letter] to Mr. Yue Xaioqun.").)

"interpretation" or rough translation of the letter prepared by Wilson (PX-6). (Tr. 4/7/04 p.m., at 41:14-20, 48:8-51:25 (Mr. Jones); Tr. 4/14/04, at 59:8-62:16 (Mr. Wilson).)[19]

* * *

69. On May 16, 1996, Orient Mineral's board of directors, noting that the corporation "is presently in the process of receiving approximately $3,000,000, U.S., to be deposited into the Bank of China," passed a resolution stating:

> WHEREAS, it is the desire of the Board of Directors that the disposition of said funds be controlled by one person, and
>
> WHEREAS, is a condition of the receipt of said funds that said person shall be Preston Jones, a member of the Board of Directors;
>
> NOW, THEREFORE, BE IT RESOLVED that Preston Jones shall be the sole and exclusive person to act on behalf of Orient Mineral Co. with respect to the disposition of all funds deposited in the Bank of China, Lingbao Branch of HeNan Province; and
>
> . . .
>
> BE IT FURTHER RESOLVED that the Board of Directors and Orient Mineral Co. shall hold the Bank of China harmless from

all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China.

(PX-8; PTO at pt. III, ¶ 6; Tr. 4/14/04, at 72:19-74:3 (Mr. Wilson).)

70. This Board Resolution was a formal corporate document impressed with Orient Mineral' corporate seal on a gold foil star, signed by F. Thomas Eck, III as its President, and attested to by its acting corporate Secretary, Pauline Smith. (Tr. 4/8/04, at 176:15-179:25 (Mr. Jones); PX-8.)

71. Accompanying Orient Mineral's Board Resolution was a letter dated May 16, 1996, and also signed by Eck as Orient Mineral's President. This letter was on Orient Mineral's letterhead and bore the impression of its corporate seal. It was addressed to the Bank of China and enclosed the May 16th Board Resolution, which it characterized as authorizing Preston Jones as Orient Mineral's sole and exclusive agent to approve, direct, or otherwise designate the funds on deposit with the Bank pursuant to a wire transfer from McKee. The letter further stated that the May 16th Board Resolution was confirmed and ratified in all respects and that Preston Jones shall have full and complete authority with regard to the disposition of said funds. (PX-8; Tr. 4/7/04 p.m., at 53:16-57:15 (Mr. Jones); Tr. 4/8/04, at 180:1-182:23 (same); PTO at pt. III, ¶ 7.)

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* * *

74. After the loan documents had been executed, Plaintiffs initiated the wire transfer of the US$ 3 million to China on May 21, 1996, through the Bank of China's branch office in New York. (PX-148, PX-149; Tr. 4/7/04 p.m., at 69:7-72:9 (Mr. Jones)).

* * *

78. Although Mr. McKee had already wired US$ 3 million before May 24, 1996, it was a condition of his investment that Wil-Bao adopt a board resolution giving Mr. Jones authority over Wil-Bao expenditures exceeding US$ 25,000. Accordingly, on May 24, 1996, the Wil-Bao board of directors held a special meeting in Mr. Wilson's hotel room in Lingbao, at which six of the seven board members were present. (Tr. 4/7/04 p.m., at 73:20-25 (Mr. Jones); Tr. 4/8/04, at 160:163:12 (same); Tr. 4/14/04, at 69:12-72:8 (Mr. Wilson).)

79. At this meeting Wil-Bao adopted a Board Resolution that provided in pertinent part:

> Be it further resolved that until said sums are repaid in full Preston Jones shall be appointed as the director of Wil Bao responsible for the management of the financial affairs of Wil Bao with the sole authority to approve any expenditure of Wil Bao in excess of $25,000 U.S. dollars.

(PX-16; PTO at pt: III, ¶ 9.)

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80. Like the May 16th Orient Mineral resolution, this May 24th Wil-Bao Board Resolution was drafted by Mr. Eck. (Tr. 4/7/04 p.m., at 75:5-7 (Mr. Jones); Tr. 4/14/04, at 70:21-25 (Mr. Wilson).) It does not contain any reference to the Bank of China, or to the disbursement or disposition of funds in any account at the Bank; nor does it bear any of the indicia of corporate authority (such as company letterhead, corporate seal imprint, secretary's attestation, officer's cover letter) that the May 16th Orient Mineral Board Resolution bore. (*Compare* PX-16 *with* PX-8.)

* * *

88. Mr. Yue was the only person present during the meeting who could speak and understand both English and Chinese, and Yue provided all of the translation between the English speakers and Chinese speakers during the meeting. (Tr. 4/7/04 p.m., at 82:11-17, 88:8-93:23 (Mr. Jones); Tr. 4/8/04, at 174:4-15, 175:6-19, 185:4-186:7, 187:1-10 (same); Tr. 4/14/04, at 79:11-80:1 (Mr. Wilson) Tr. 4/15/04, at 16:5-18:13 (same); Transcript of Trial, dated April 21, 2004 ("Tr. 4/21/04"), at 8:2-13 (Mme. Zhou); PTO at pt. III, ¶ 14.)

89. Thus, *Mr. Yue was the only participant in the May 27, 1996 meeting who knew both what the Americans had said in English and how that was then translated into Chinese, and what the bank officers had said in Chinese, and how that was then translated into English.* (Tr. 4/8/04, at 187:1-10 (Mr. Jones); Tr. 4/15/04, at 19:4-10, 21:5-15 (Mr. Wilson).)

90. Messrs. Wilson, Jones, and Eck relied upon Mr. Yue to represent Orient Mineral's interests in speaking with the bank officers and depended upon Yue to translate accurately the statements that they made to the bank officers during the meeting. Mr. Wilson trusted Mr. Yue and had confidence that Yue was representing them properly. (Tr. 4/15/04, at 14:10-15:13, 16:5-18:9 (Mr. Wilson); Tr. 4/14/04, at 85:25-86:14 (same).)

* * *

170. The US$ 400,000 was transmitted by wire transfer and received by Zions First National Bank in Sandy, Utah, for the benefit of Ms. Saren Gaowa on September 3, 1996. (PTO at pt. III, ¶ 19.)

* * *

346. As set forth above, on or about May 14, 1996, Mr. Yue made application for an account at the Lingbao Sub-branch of the Bank of China in the name of Orient Mineral. (*See supra* Paragraph 59.)

347. On or about that same day, the Bank acknowledged receipt of Yue's application, and expressly "agree[d] to establish in our bank a temporary U.S. dollar account at the request of your honorable company (Sino-U.S. Joint Venture Henan Wil-Bao Metal Smelting Company, Ltd.)." (PX-225/PX-51PX-6.)

348. By letter of that date, Mme. Liu advised Yue of "the relevant particulars," including the name,

number and location of the account, and the statement that "[a]fter the funds are transferred, our bank will be responsible for safekeeping these funds." (PX-225/PX-5/PX-6; *see* Tr. 4/12/04, at 25:6-7 (Mme. Liu) ("In the letter it stated that if the funds were to be transferred in then the bank would safe keep the funds.").) Further, she requested that Mr. Yue bring into the bank the "business charter" or license, the company stamp, and a company authorization letter so that the funds "can be used in the joint venture in accord with arrangements made by the representative of the American party." (*Id.*)

349. Through Mr. Yue and then Mr. Wilson, Orient Mineral received Mme. Liu's May 14th letter (PX-5), and gained at least a rudimentary grasp of its contents through Yue's explanation and Wilson's rough draft translation of its text (PX-6). (Tr. account as a "temporary" account, that is, "an account really held by the bank, maintained in the bank . . . until the customer decides what to do with the funds." (Tr. 4/15 04, at 197:18-198:9, 203:3-20 (Mr. Harner); PX-5; PX-235.)

* * *

363. The terms of the contract between Orient Mineral and the Bank of China, formed in Lingbao, China, include the Bank's promise to receive and keep safe Orient Mineral's funds when wired to the Bank, awaiting further instructions by Orient Mineral's designated representative; and Orient Mineral's performance in (*i*) wiring US$ million to the Bank's

Lingbao Sub-branch; *(ii)* designating Preston Jones as Orient Mineral's representative with authority to dispose of those funds; and *(iii)* its offer to hold the Bank harmless "provided the directions of Preston Jones are followed by said Bank of China," as those terms are reflected in Mme. Liu's May 14th letter as it was understood at that time by the directors of Orient Mineral as well as Orient Mineral's May 16th board resolution and cover letter (PX-8), first presented to the Bank at the May 27, 1996 meeting.

364. The Bank remitted the entire balance of the Orient Mineral wire transfer as directed by Preston Jones, evidenced *inter alia*, by the transfer slip signed by Jones on May 27, 1996 (BCX-15), and the corresponding receipt (PX-111).

365. None of the documents submitted to the Bank by Orient Mineral made any reference to a US$ 25,000 limitation on any account. (*See* Tr. 4/23/04, at 132:4-15 (Mr. Ludwig); Transcript of Hearing, dated June 18, 2004, at 69:10-70:14 (same).)

366. The contract between Orient Mineral and the Bank of China did not encompass any agreement as to a US$ 25,000 limitation or any other terms and conditions of any account to be opened for the Wil-Bao joint venture, or any other entity, unit or individual.

*Appendix C*

## The May 24th Wil-Bao Resolution & the May 27th Meeting

367. Mr. Jones testified that at the May 27th meeting, he said that "as special director of Wil-Bao," he "was to have the authority to control . . . the expenditures in excess of $25,000" from the Wil-Bao U.S. dollar account (no. 148250070008), based upon the May 24th Wil-Bao board resolution (PX-16). (Tr. 4/8/04, at 6:19-7:20 (Mr. Jones).)

368. Mr. Jones testified at trial that the May 24th Wil-Bao board resolution was provided to the Bank during the May 27, 1996 meeting, but he earlier submitted a declaration to the court in which he stated that he was unsure whether the May 24th resolution was provided during the May 27 or the May 29 meeting (*See* Declaration of Preston Jones, dated April 8, 2002, at ¶ annexed as Exhibit 1 to Plaintiffs' Opposition to Defendant Bank of China's Renewed Motion for Judgment on the Pleadings, filed April 9, 2002 (dkt. no. 105); Tr. 4/9/04, at 35:7-37:5 (Mr. Jones).)

369. Mr. Jones testified that Mr. Wang handed the resolution to Mme. Liu, who reviewed the Chinese version and then handed it to Mme. Zhou, who left the room with it. (Tr. 4/8/04, at 208:4-23 (Mr. Jones).)

370. Mme. Liu, on the other hand, testified that she did *not* see the May 24th Wil-Bao resolution at the May 27th meeting. (Tr. 4/12/04, at 56:19-57:8 (Mme. Liu)) Both Mr. Wang and Mme. Zhou testified that they did not

see the document at the May 27th meeting, or at any time prior to this litigation. (*Id.* at 85:16-21, 104:7-17 (Mr. Wang); Tr. 4/19/04, at 129:4-18, 136:22-13.7:3 (same); Tr. 4/21/04, at 14:16-15:4 (Mme. Zhou).)

371. Messrs. Wilson and Eck had also submitted prior declarations in which they both stated that they were uncertain whether the Wil-Bao resolution was provided to the Bank on May 27 or May 29, 1996. (Exhibits 2 & 3 to Plaintiffs' Opposition to Defendant Bank of China's Renewed Motion for Judgment on the Pleadings, filed April 9, 2002 (dkt. no. 105).)

372. Mr. Wilson testified at trial that Mr. Jones asked Mr. Eck "to hand Mr. Wang that resolution both in Chinese and in English. And so he just kind of looked at the papers and just set them down," but that this occurred at the *May 29th* meeting with the bank. (Tr. 4/14/04, at 86:19-22; *id.* at 87:5-14; Tr. 4/15/04, at 23:1-24:1 (same)).)

> Q. I think you talked yesterday about a meeting on May 29th of 1996, and that was again at the Bank of China, Lingbao Branch. Do you remember that?
>
> A. I do.
>
> Q. That was pretty short, correct?
>
> A. Relatively short, correct.

Q. That is where Exhibit 23 was presented to the bank in your memory?

A. That is right. There was another one as well that I gave. I didn't give it but it was given.

Q. What was the other one?

A. That was the one where it showed that Mr. Jones had been authorized by the Wil-Bao board to have control over the dollar account of any expenditures over $25,000.

Q. I am going to show the witness Exhibit 16, Plaintiff's Exhibit 16. Is that the document that you are talking about?

A. Yes, this is the document.

Q. It is your recollection that that was handed over to Mr. Wang at the May 29th meeting?

A. I remember it specifically.

Q. I think you said that when it was handed to Mr. Wang he just put it down on his desk?

A. That is right. He received it and just put it on his desk.

(Tr. 4/15/04, at 23:1-24:1 (Mr. Wilson).)[134] At this same meeting, the note authorizing US$ 1.215 million in expenditures by Yue (PX-23) was written by Mr. Wilson at Jones' direction and handed by Mr. Eck to Mr. Wang as well.

373. To Jones, the Wil-Bao resolution served as the predicate for his written authorization to Yue to remit forty percent (40%) of the McKee loan proceeds on the designated expenditures, and it stands to reason that both documents would have been presented together.

374. No witness testified to any specific discussion of the May 24th Wil-Bao board resolution (PX-16) with the bank officers present at the May 27, 1996 meeting; nor did the bank officers obtain a separate "in-house" Chinese translation of the Wil-Bao resolution during that meeting, as they had with the Orient Mineral resolution and cover letter (PX-8).[135]

375. More likely than not, the May 24th Wil-Bao board resolution (PX-16) was presented to Mr. Wang at the May *29th* meeting at the Lingbao Sub-branch of the Bank of China, as Mr. Wilson testified, together with the handwritten note penned by Wilson and signed by Jones and Yue, authorizing US$ 1,215,000 in expenditures by Yue (PX-23).

---

134. Without explanation, Wilson subsequently altered his testimony as to sequence upon redirect examination by Plaintiffs' counsel. *(See* Tr. 4/15/04, at 114:17-20 ("Q. When was that given to Mr. Wang, at the meeting May 27th or May 29th? A. It was handed to him on the May 27th.").)

*Appendix C*

376. Apart from its presentation to Mr. Wang on May 29th, the May 24, 1996 Wil-Bao board resolution (PX-16) does not make any reference to the Wil-Bao bank accounts or to any limitation on transactions in the Wil-Bao bank accounts, and does not contain any requirement that the bank contact Jones in the United States concerning transactions in Wil-Bao accounts.[136]

---

136. Plaintiffs concede that the Wil-Bao resolution "was not intended to be addressed to the Bank," and argue "that it was merely given to the Bank as an additional means of ensuring that they understood Jones' instructions." (Plaintiffs' Response to Bank of China's Proposed Findings of Fact and Conclusions of Law, filed June 25, 2004 (dkt. no. 325), at 12-13; Transcript of Hearing, dated June 18, 2004, at 64:20-65:2 (Mr. Ludwig).) The source of Jones' authority to give instructions to the Bank concerning Wil-Bao accounts remains unclear.

The resolution has the appearance of an internal control on "expenditures" by the company more than a restriction on a specific bank account; *e.g.*, Jones' approval authority terminates when Mr. McKee was fully repaid—necessarily an internal Wil-Bao matter, and an event of which the Bank would-likely be unaware. (PX-16; *see* (Tr. 4/8/04, at 165:3-166:12 (Mr. Jones).) On cross-examination, Mr. Jones conceded that he knew that there was a difference between an "expenditure" and a withdrawal from a bank account. (Tr. 4/8/04, at 166:25-172:1 (Mr. Jones).) Accordingly, the Wil-Bao resolution may fairly be read to be concerned with the management of the financial affairs of Wil-Bao and not the power to control Wil-Bao's account with the Bank. (PX-l6; *but cf.* Tr. 4/15/04, at 69:11-72:9 (Mr. Wilson) (Wilson anticipated that Bank "would have some responsibility to recognize that any large disbursements" were under Jones' control).)

*Appendix C*

377. Plaintiffs' banking expert, Stephen M. Hamer, testified that Chinese banks do not require a board resolution when opening an account. (Transcript of Trial, dated April 16, 2004 ("Tr. 4/16/04"), at 20:2-11.)

* * *

380. No one from Wil-Bao brought to the May 27th meeting any document addressed to the Bank of China sealed with the Wil-Bao company seal directing the Bank of China to put any limitation on the Wil-Bao accounts or requiring Jones's personal authorization for any withdrawal or disbursement from the Wil-Bao accounts exceeding US$ 25,000. (Tr. 4/15/04, at 69:11-72:16 (Mr. Wilson).)

381. Nothing in the Wil-Bao account documentation created at the May 27th meeting referred to any authority of Mr. Jones as a director of Wil-Bao over transfers or disbursements from the Wil-Bao U.S. dollar account exceeding US$ 25,000, or limiting the authority of those whose "chop" seals did appear on the account imprint card, Mr. Yue and Mr. Zhang. (Tr. 4/19/04, at 130:12-131:5, 132:1-10 (Mr. Wang).)

* * *

385. The May 24th Wil-Bao board resolution was not part of the colloquy concerning the opening of the Wil-Bao accounts on May 27, 1996, and its terms did not become part of the agreement between Wil-Bao and the Bank of China concerning the management of those accounts.

386. The agreement between Wil-Bao and the Bank of China concerning the Wil-Bao accounts did not include any limitation on remittances from the Wil-Bao U.S. dollar account apart from the requirement that transactional documents (*e.g.*, transfer/remittance slips, cash checks) bear authorizing seal imprints matching the three imprints on the specimen card prepared at the May 27th meeting (BCX-11). No additional limitations or restrictions were endorsed on the account cards.

387. The agreement between Wil-Bao and the Bank of China concerning the Wil-Bao accounts did not require the prior approval of Preston Jones for every remittance, transfer or expenditure of $25,000 or more from the Wil-Bao U.S. dollar account, or the Wil-Bao RMB account.[138]

* * *

## CONCLUSIONS OF LAW

* * *

### Breach of Contract

15. It is a well-recognized principle that, "A condition precedent to the enforcement of any contract is that there be a *meeting of the minds* of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced." *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976) (emphasis added & citation omitted).

*Appendix C*

16. The contract between Orient Mineral and the Bank of China was formed by the conduct of Orient Mineral in (*i*) wiring US$ 3 million to the Lingbao Sub-branch, (*ii*) designating Preston Jones as Orient Mineral's sole representative with authority to dispose of those funds, and (*iii*) promising to hold the Bank harmless if Jones' instructions are followed (PX-8), in consideration for the Bank's promise to receive and safeguard those funds, so that the funds can be used in the joint venture in accord with arrangements to be made by Orient Mineral's designated representative, as set forth in Mme. Liu's letter of May 14, 1996 (PX-5).

17. The Bank of China performed its promise to receive and safeguard the Orient Mineral funds (US$ 2,999,990), awaiting the instructions of Orient Mineral's designated representative, Preston Jones.

18. The Bank of China proceeded to follow Jones' instructions to transfer the Orient Mineral funds into Wil-Bao's U.S. dollar account, performing its promise as set forth in the May 14th letter, to the extent that Jones' instructions were in fact communicated to the Bank.

19. To the extent that Mr. Jones' directions were not fully communicated to the Bank, that failure to communicate is attributed to the conduct of Orient Mineral's shareholder and director, Mr. Yue, who Mr. Jones understood to be acting on behalf of Orient Mineral in translating Jones' directions to the Bank.

20. The Bank of China did not breach its contract with Orient Mineral.

21. The terms governing the Wil-Bao accounts opened at the Lingbao Sub-branch of the Bank of China were those mutually assented to by the Bank and its customer, the Wil-Bao joint venture, and spelled out, either expressly or implicitly, with sufficient definiteness to be enforced.[195]

---

195. Plaintiffs' counsel now insists that Jones' authority to direct the disposition of Orient Mineral's funds extended to the authority to direct the terms governing the *Wil-Bao* accounts, specifically "to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control." (Second Amended Complaint at 14 ¶¶ 57-59.) According to counsel, Jones' instruction—to be followed by the Bank under its agreement with Orient Mineral—"really was, on behalf of *Orient*, was to set up a *Wil-Bao* U.S. dollar account with a $25,000 restriction" on disbursements. (Transcript of Hearing, dated June 18, 2004, at 24:12-14 (Mr. Ludwig) (emphasis added).) At the same time, according to counsel, "It was his instruction, wearing now his other hat, and he was a special director for both plaintiffs, to set up the same dollar restricted account into which the investment account of Wil-Bao would reside subject to Jones' authority." (*Id.* at 24:16-19; *see id.* at 30:11-15, 48:8-10 ("and wearing an Orient hat and wearing a Wil-Bao hat, set up the Wil-Bao U.S. dollar account with the $25,000 restriction that I can control"); *see* Tr. 4/8/04, at 4:11-7:19 (Mr. Jones) (Jones' two hats discussed).)

Counsel's haberdashery cannot gloss over the authority issue: nothing in the Orient Mineral board resolution or cover letter (PX-8) says that Jones was empowered to speak for

(Cont'd)

22. There was no mutual assent to any terms that were not in fact communicated to the Bank by Wil-Bao either in writing or through Wil-Bao's director and general manager, Mr. Yue at the time that the Wil-Bao accounts were opened by the Bank.

23. The terms of the contract between the Bank and Wil-Bao did not include any limitation on withdrawals, transfers or remittances that were not set forth on the "chop" seal specimen cards that were created at the May 27, 1996 meeting.

24. No requirement that Mr. Jones authorize any expenditure in excess of US$ 25,000 from the Wil-Bao U.S. dollar account (or the Wil-Bao RMB account) was endorsed on the account specimen cards or otherwise made a term of the contract between Wil-Bao and the Bank.

25. The Bank of China did not breach its contract with Wil-Bao concerning the Wil-Bao accounts by processing transfers or remittances in excess of US$ 25,000 when requested by Wil-Bao,[196] as evidenced by

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(Cont'd)

*Wil-Bao* in opening Wil-Bao's accounts or disposing of Wil-Bao's funds. (*Cf.* Transcript of Hearing, dated June 18, 2004, at 69:10-70:14 (Mr. Ludwig).)

196. This could only be a breach of contract if the Bank had opened the "$25,000 restricted Wil-Bao USD account" that the Plaintiffs now allege the Bank failed to establish. (Second Amended Complaint, at 14-15 ¶ 59.)

the three required "chop" seal imprints, in particular, the wire transfer of US$ 400,000 on or about August 28, 1996 to Zions First National Bank in Sandy, Utah for remittance to Saren Gaowa.

* * * *

## APPENDIX D — AMENDED COUNTERCLAIM DATED MARCH 19, 2008

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

**Civil No. 2:98-CV-238J**
**Judge Bruce S. Jenkins**

**ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO. LTD.**

**Plaintiffs,**

**v.**

**BANK OF CHINA, DAVID YUE a/k/a YUE YIAOQUN, and SAREN GAOWA, and DOES 1-30**

**Defendants.**

*Appendix D*

**BANK OF CHINA,**

**Counterclaim-Plaintiff,**

**v.**

**ORIENT MINERAL COMPANY, F. THOMAS ECK, III, ART WILSON, PRESTON JONES, and R. ELLSWORTH McKEE,**

**Counterclaim-Defendants.**

## AMENDED COUNTERCLAIM FOR INDEMNIFICATION

1. Counterclaim-Plaintiff, the Bank, is a corporation organized and existing under the laws of the People's Republic of China and was owned by the government of that country. The Bank's principal office is in Beijing. At the time this action was filed, the Bank was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602 through 1611 ("FSIA").

2. Counterclaim-Defendant Orient is a corporation duly formed and organized under the laws of the State of Nevada with its principal place of business in Nevada.

3. Counterclaim-Defendant F. Thomas Eck, III, is a United States citizen and a resident of Nevada and/or California and was a member of the Board of Directors

of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

4. Counterclaim-Defendant Art Wilson is a United States citizen and a resident of Nevada and was a member of the Board of Directors of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

5. Counterclaim-Defendant Preston M. Jones is a United States citizen and a resident of Tennessee and was a member of the Board of Directors of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

6. Counterclaim-Defendant R. Ellsworth McKee is a United States citizen and a resident of Tennessee and was the real party in interest behind and an alter ego of Orient, as well as the principal of Counterclaim-Defendant Preston Jones, who acted at all times as the agent of Counterclaim-Defendant McKee.

7. Jurisdiction in this district is predicated on 28 U.S.C. § 1332(a)(4).

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a).

**FACTUAL BACKGROUND**

9. On the morning of May 27, 1996, the Ling Bao Sub-Branch of the Bank received from McKee via cable

a funds transfer of $2,999,990.00. This transfer of McKee's funds was made by or at the direction of McKee and consisted of funds advanced by McKee to or on behalf of Orient. At the time of the transfer, McKee was, and on information and belief still is, the direct or beneficial owner of at least 87% of the authorized stock of Orient and 100% of the issued stock of Orient.

10. Later on the morning of May 27, 1996, David Yue, Eck, Wilson, Jones, and others came to the Bank's Ling Bao Sub-Branch and met with officers of the Ling Bao Sub-Branch.

11. David Yue and the others, purporting to act on behalf of Orient, Wil-Bao, their Boards of Directors, and/or R. Ellsworth McKee, provided to the Bank's Ling Bao Sub-Branch officers the May 16, 1996 Letter and Board Resolution, in which Orient and its Board of Directors (including Eck, Wilson, and Jones), authorized Preston Jones, acting as McKee's agent and representative, to dispose of the McKee funds. In addition, Orient and its Directors, including Wilson, Eck, and Jones as McKee's agent and representative, agreed to indemnify and hold the Bank harmless from any claims and liabilities "of any sort whatsoever" resulting from the Bank's compliance with the transfer directions of Preston Jones.

12. During the same meeting with the Ling Bao Sub-Branch, Preston Jones signed a written transfer slip instructing the Bank's Ling Bao Sub-Branch to

transfer the entire balance of McKee's funds of $2,999,990.00 to the account of Wil-Bao.

13. In order to identify himself, Preston Jones produced and displayed to the Bank's Ling Bao Sub-Branch officers his U.S. Passport and subscribed his Passport Number upon the transfer slip.

14. Relying upon the May 16, 1996 Letter and Board Resolution, as well as the transfer slip signed by Preston Jones, the Ling Bao Sub-Branch did on that same day (Monday, May 27, 1996) transfer McKee's funds to the account of Wil-Bao, as directed by Preston Jones based upon his actual and/or apparent authority to act on behalf of Orient and McKee.

15. Thereafter, the Bank handled transactions in China for the accounts of Wil-Bao, including the $400,000 wire transfer in August 1996 to Saren Gaowa in Utah, in accordance with the laws and customary banking practices of China.

16. Despite the foregoing, Orient, with the co-operation and support of Wilson, Eck, and Jones, and funded by McKee, commenced and for nearly ten years have prosecuted this action against the Bank.

17. From both the transactional documents entered into in connection with McKee's investment in Orient and the Wil-Bao project and also from McKee's requirement that his agent and representative Preston Jones have complete control of the disposition of

McKee's $3 million investment funds and approval authority for any major expenditures (*i.e.*, over $25,000) of the Wil-Bao project, it is apparent that Orient was influenced and governed by McKee, directly and indirectly, throughout the Wil-Bao project.

18. In addition, McKee's interests and Orient's interests were inseparable. Orient's interest in pursuing its claims against the Bank in this action were and are for the purpose of repaying McKee, who is the beneficial owner of 100% of Orient's issued stock.

19. Finally, in light of the fact that Orient has few, if any, assets and that McKee is the real party in interest behind Orient, allowing McKee to hide behind the fiction of Orient's independent corporate existence would effectively deprive the Bank of the indemnification that it was promised and that it relied upon. Such a result would sanction the fraudulent nature of the indemnification promise made Orient and its Directors to the Bank and would promote injustice by allowing Orient, its Directors, and McKee to utilize this Court and the U.S. judicial system to damage the Bank with impunity.

20. Based upon the facts of and record in this case, McKee, as Orient's alter ego, must be held accountable for Orient's indemnification of the Bank.

21. In addition, the facts and record in this case show that, at all times, Preston Jones acted as the agent and representative of his disclosed principal,

R. Ellsworth McKee. In that role, Jones had actual and apparent authority to act on behalf of McKee, including: acting as a Director of Orient to indemnify the Bank if it followed Jones's directions; participating in the presentation to the Bank of the Orient Board Resolution containing the indemnification upon which the Bank relied; directing the Bank as to the disposition of the McKee funds; supervising the expenditures of Wil-Bao; demanding that payments be made to McKee from the Wil-Bao project; inspecting the books and records of Wil-Bao; and continually acting for and protecting McKee's interests and investment.

22. Accordingly, McKee is liable to the Bank for the effect of the actions of his agent, Preston Jones, separate and apart from his liability as Orient's alter ego.

23. Despite the fact that the Bank followed the directions of Preston Jones with respect to the disposition of the McKee funds, the Bank has been subjected to claims and liabilities in this action. These claims include claims by Orient and Wil-Bao, and these liabilities include liabilities of the Bank for its costs of defense, including its attorneys' fees and litigation expenses herein.

24. Accordingly, pursuant to their indemnification, Orient, its Directors, and McKee must be held accountable to hold the Bank harmless from these claims and liabilities and must repay the Bank for its costs of defense, including attorneys' fees and litigation expenses, which to date are in excess of $900,000.

*Appendix D*

WHEREFORE, Defendant and Counterclaim Plaintiff Bank of China demands Judgment as follows:

A. That Orient Mineral Company, F. Thomas Eck, III, Art Wilson, Preston M. Jones, and R. Ellsworth McKee be held jointly and severally liable to the Bank for its costs of defense in this action; and

B. That the Court grant the Bank such other and further relief as this Court may deem just and proper.

Dated: March 19, 2008

RAY QUINNEY & NEBEKER P.C.

s/ Arthur B. Berger
Arthur B. Berger

Christopher Brady, *pro hac vice*
Orlee Goldfeld, *pro hac vice*
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*Appendix D*

## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2008, I filed the foregoing **AMENDED COUNTERCLAIM FOR INDEMNIFICATION** with the Clerk of the Court and mailed a copy of the foregoing, first-class postage prepaid, to the following:

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## APPENDIX E — ORIENT MINERAL COMPANY'S MOTION TO DISMISS AMENDED COUNTERCLAIM FILED APRIL 2, 2008

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**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

Case No. 2:98CV00238J

Judge Bruce S. Jenkins

ORIENT MINERAL COMPANY, *et al.*,

Plaintiffs/Counterclaim-Defendants,

v.

BANK OF CHINA, *et al.*

Defendant/Counterclaim-Plaintiff.

*Appendix E*

## COUNTERCLAIM-DEFENDANT ORIENT MINERAL COMPANY'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff/Counterclaim-Defendant Orient Mineral Company ("Orient"), by counsel, for the reasons more fully set forth in the attached Memorandum of Law, hereby move this Court to dismiss Defendant/Counterclaim-Plaintiff Bank of China's Amended Counterclaim for Indemnification, for failure to state a claim upon which relief can be granted to the Bank. Further, pursuant to Utah Code Ann. § 78-27-56, Orient requests its reasonable attorneys' fees and expenses incurred in defending a counterclaim that is without merit and not brought in good faith.

Dated: April 2, 2008

Respectfully submitted,

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## APPENDIX F — INDIVIDUAL COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIM, FILED APRIL 16, 2008

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**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

Case No. 2:98CV00238J

Judge Bruce S. Jenkins

ORIENT MINERAL COMPANY, *et al.*,

Plaintiffs/Counterclaim-Defendants,

v.

BANK OF CHINA, *et al.*

Defendant/Counterclaim-Plaintiff.

*Appendix F*

## THE INDIVIDUAL COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(6), Counterclaim-Defendants Art Wilson ("Wilson"), Preston Jones ("Jones"), and R. Ellsworth McKee ("McKee") (jointly the "Individual Defendants"), by counsel, for the reasons more fully set forth in the attached Memorandum of Law, hereby move this Court to dismiss Defendant/Counterclaim-Plaintiff Bank of China's Amended Counterclaim for Indemnification, for lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted to the Bank. Further, pursuant to Utah Code Ann. § 78-27-56, the Individual Defendants request their reasonable attorneys' fees and expenses incurred in defending a counterclaim that is without merit and not brought in good faith.

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*Appendix F*

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2008, I caused a copy of the foregoing, with the supporting Memorandum of Law, to be filed electronically with the Court and served via ecf email upon the following:

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No. 07-1095

FILED

MAY 12 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,
*Petitioners,*

v.

BANK OF CHINA,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION WITH SUPPLEMENTAL APPENDIX


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## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their petition, Petitioners demonstrated that the decision below: (1) widens a conflict under clause one of the Foreign Sovereign Immunities Act ("FSIA") over the term "substantial contact" left unresolved in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Pet. 16-27); (2) conflicts, as to clause two, with decisions holding its view of instruments placed in U.S. commerce "entirely anomalous" (Pet. 27-29); (3) conflicts, as to clause three, with decisions of the Court and Second Circuit in limiting jurisdiction to part of a transaction or occurrence, and splitting claims between U.S. courts and China (Pet. 29-32); (4) presents important and recurring questions, such as the meaning of "substantial contact," derived from *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (Pet. 33-37); and (5) sanctions "grossly unfair" departures that call for this Court's supervision. (Pet. 37-38.)

Respondent does not dispute any of these points,[1] except the first concerning the clause-one conflict, that it attempts to minimize through a novel argument that *Nelson* removed any conflict over a question it did not reach. Instead, in its opposition, Respondent addresses principally a supposed lack of finality, and then the merits, of the decision below, but fails to advance any reason why that decision ought not to be reviewed by this Court.

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[1] *See* Opp. 24 (no discussion of clause two and three conflicts, or of cramped view of clause three to limit jurisdiction to split claims); Opp. 23-25 (no discussion of meaning of "substantial contact" or *McGee*, or of district court's limiting discovery to third of five transfers, yet subjecting Petitioners to trial on all).

## I. RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS NOT FINAL IS FRIVOLOUS

Respondent resists review by miscasting the decision below as "undeniably interlocutory." (Opp. 11-13). The Tenth Circuit rendered a final judgment on jurisdiction and the merits, remanding only a "claim for attorney's fees." (Pet. App. 57a.) As this Court has held, "we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). "Courts and litigants are best served by a bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291, whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-03.[2]

## II. RESPONDENT'S CONTENTION THAT *NELSON'S* DEFINING OF "COMMERCIAL ACTIVITY" IS PROPERLY USED BY THE TENTH AND OTHER CIRCUITS TO DEFINE "SUBSTANTIAL CONTACT" UNDERSCORES A NEED FOR REVIEW

Respondent otherwise opposes certiorari by contending this Court's decision fifteen years ago in *Nelson* makes it unnecessary to address the all too

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[2] The Court has also used a "'finality' test" for 28 U.S.C. § 1254. *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976). Respondent's cases involve remand of a central issue. Even in such cases, this Court has granted review "to resolve a Circuit conflict. . . ." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 426 (1987).

evident circuit conflicts. *Nelson* expressly did not decide conflicts that were then apparent and have now caused increased divergence. Just as important, the Tenth Circuit and other courts have misapplied *Nelson* as bearing on an issue that decision never reached, creating *more* conflict and confusion, not less. This situation only reinforces the need for this Court to issue a writ of certiorari in this case.

1. Respondent asserts that this Court, having in *Nelson* construed the term "commercial activity" in deciding the *nature* of activity under 28 U.S.C. §§ 1605(a)(2) and 1603(d), need not engage in "judicial parsing or interpretation" of the phrases "commercial activity carried on in the United States" and "substantial contact" under §§ 1605(a)(2) and 1603(e) in deciding the *jurisdictional nexus* of that activity. (Opp. 17, 23-24). This Court, however, speaking through Justice Souter, expressly did not decide the jurisdictional issue: "Because we conclude that the suit is not based upon any *commercial activity*, we need not reach the issue of *substantial contact* with the United States." 507 U.S. at 356 (emphasis added). Yet Respondent claims *Nelson* supplies the "applicable rule," and that the decision below involves at most "misapplication of a properly stated rule of law." (Opp. 15, 18). There is no "properly stated rule," as this Court never addressed the issue.

Respondent similarly asserts Petitioners "try to evade" *Nelson*'s "analytical starting point," of "'identifying the *particular* conduct on which the [plaintiffs'] action is 'based','" namely the "'elements of a claim,'" (Opp. 16-17). While such analysis may ensure the *nature* of each act is not sovereign – a

"starting point" inapplicable to this case since the commercial nature of Respondent's acts is undisputed – this case requires a jurisdictional analysis under clause one that considers the scope of Respondent's conduct and its "substantial contact" with the United States. Respondent's argument ignores *Nelson's* limited holding, and Justice Stevens' caution: "These two conditions should be separately analyzed because they serve different purposes." 507 U.S. at 377 & n.2 (Stevens, J., dissenting). It also overlooks guidance in concurring and dissenting opinions which did address "substantial contact."[3] It likewise ignores *McGee*, from which Congress derived the standard. (Pet. 35-37.) *McGee* involved only three contacts, none considered elements of a claim, holding instead: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223.

2. Respondent does not deny a clause-one conflict was identified by the courts of appeals themselves as warranting this Court's resolution, (Pet. 14, 19), but contends any conflict "[p]re-dates *Nelson*" and is "illusory." (Opp. 15.) That is not true.

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[3] Justice White recognized that activity can *either* be "carried on in the United States," or as defined, have "substantial contact" through a "sufficient nexus" or "connection to this country." 507 U.S. at 370 (White, J., concurring). Justice Kennedy applied a similar analysis, noting the activities had "more than substantial contact with the United States; most of them were 'carried on in the United States.'" *Id.* at 372-73 (Kennedy, J., dissenting). Justice Stevens concluded: "Whether the first clause . . . authorizes 'general' . . . [or] only 'specific' jurisdiction over . . . claims that have a substantial contact with the United States, petitioners' contacts are, in my view, plainly sufficient," *id.* at 379 (Stevens, J., dissenting).

While this Court tried in *Nelson* to set out a general guide to interpretation of the FSIA and clause one, that effort has not reduced the divergence over clause one's jurisdictional scope. The same conflicts remain, and have become exacerbated since.

Respondent also does not dispute the Tenth Circuit's precedent-setting approach to clause one was "literal," (Opp. 14, 18),[4] or that the Ninth Circuit applied a "doing business" standard in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1998),[5] completing, among the circuits, a four-way doctrinal split left undecided in *Nelson*. The Second and D.C. Circuits applied a "tighter nexus" standard before *Nelson*, (Pet. 19-20, 36 n.3), and after, followed by the Eighth Circuit. *See Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147, 155 (2d Cir. 2007)("'greater than common law causation'"); *BP Chemicals Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005)("nexus requirements . . .

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[4] Respondent attempts to justify the approach as consistent with rules of construction. But the approach has been rejected by other circuits precisely because it does not follow the cardinal rule of construction that *all* of the statute be considered, as Justice Thomas reminds: "begin . . . with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007). The Tenth Circuit focused on only part of the text: "commercial activity carried on in the United States," § 1605(a)(2), without considering the rest, § 1603(e), which defines that phrase to "mean[] commercial activity carried on by such state and having substantial contact with the United States."

[5] Contrary to Respondent's argument, *Theo. H. Davies & Co.* is in direct conflict, finding jurisdiction although the breach, by "refus[al] to pay the balance," occurred in the Marshall Islands. 174 F.3d at 972. Here, the Tenth Circuit denied jurisdiction, literally requiring an actionable wrong in the United States.

probably exceed" minimum contacts); *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998). The D.C. Circuit reaffirmed its *pre-Nelson* holding that "substantial contact" "requires more than minimum contacts," *id.* at 253, still overlooking the term comes from the "substantial connection" equivalent to minimum contacts set out in *McGee*. Yet it is one of few courts noting that *Nelson* left the "***'substantial contact' issue open.***" *Id.* (emphasis added).

Other circuits still apply a fourth "nexus" approach, (Pet. 18-19), as in *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004). The Fourth Circuit was not "reversed" by *Nelson* as Respondent mistakenly states, and is not "like the Tenth Circuit" (Opp. 17-18), but in square conflict. The Fourth Circuit applied *Nelson's* starting point to determine the *nature* of the activity, 376 F.3d at 286-91, after which it applied jurisdictional principles in finding that from "these ties, it is clear that [defendant's] conduct has 'substantial contact' with the United States," *id.* at 291-92.

Those post-*Nelson* cases that apply *Nelson's* "based-on elements" analysis for "commercial activity" to whether the activity had "substantial contact" – yet a fifth approach – are in conflict with the Fourth and Sixth Circuits. *See Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991)("'commercial activity' is the jurisdictional element" not "the elements of the cause of action," finding activity "involved substantial contact with the United States"). They also conflict with each other, spawning further inconsistency. For example, the Eighth Circuit, in finding jurisdiction, ruled

"only one element" "must concern commercial activity conducted in the United States." *BP Chemicals,* 420 F.3d at 816. The D.C. Circuit has more broadly held: "we think it more consistent with *Nelson* and the FSIA to read 'elements' as referring to *each fact necessary* to establish a claim." *Kirkham v. Air France,* 429 F.3d 288, 292 (D.C. Cir. 2005) (emphasis in original). In contrast, the Second Circuit, in denying jurisdiction, holds more narrowly that "the 'based upon' element requires a 'degree of closeness . . . considerably greater than common law causation requirements.'" *Kensington,* 505 F.3d at 155. Remarkably, besides relying upon *Nelson* for a jurisdictional analysis this Court never made, decisions like *Kirkham* and *Kensington* never mention, let alone apply, the "substantial contact" standard. Thus the circuits, without this Court's guidance, are adding yet more "gloss" and departing even further from the language and purpose of the statute. Meanwhile, the Court's decision in *McGee* remains hidden in plain view, for over forty years.

Respondent questions "how another ruling of this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve." (Opp. 16.) Absent from its brief is any explanation how these conflicts could be resolved without this Court's ruling.

3. Respondent's remaining arguments, directed to the merits, are erroneous. While there are factual disputes between the parties,[6] they do

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[6] For example, there is a significant anomaly in conclusions drawn below. In the petition, Petitioners did not assign dates to two bank meetings, (Opp. 5-6), but did inadvertently imply, as they alleged (SAC ¶19, Reply App. 6sa), that the Wil-Bao

not affect the facts needed to resolve any of the three jurisdictional questions presented for review.[7]

Respondent persists in mischaracterizing the single $400,000 transfer as a "claim," (Opp. 8), when it merely was the third of five unauthorized transfers covered by each claim. (Reply App. 8sa-9sa, SAC, ¶¶28-32). The First Amended Complaint (May 25, 2001) and Second Amended Complaint ("SAC") plead, *inter alia*, contract, negligence and fraud "claims," alleging, for example, Respondent breached its contract by: "(a) failing to follow directions given by Preston Jones . . . to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control, and (b) failing to take

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resolution was given at the first. After that meeting, on May 27, 1996, the court found key facts the Bank denied: (a) a second meeting occurred on May 29; (b) Jones gave the Bank authorization to transfer $1.215 million from Wil-Bao's account; and (c) the resolution, in Chinese, confirming his sole authority to authorize disbursements over $25,000, was presented "[m]ore likely than not" on May 29, not May 27. (Opp. App. 22a-25a; Pet. App. 11a-12a.) The court indicated that had the resolution been presented on May 27, it would have found the Bank was "alerted to [a] specific need to ascertain the intentions of Mr. Jones concerning the Wil-Bao account through direct communication with Jones," (FF/CL ¶¶ 427, 429, Reply App. 19sa-20sa). The lower courts never explained why presentation on May 29 failed to cause the Bank to ascertain Jones' intentions "directly," while presentation on May 27 would, or why his $1.2 million authorization did not also serve that purpose, if the Bank believed he relinquished control two days before. Both events took place before the first two unauthorized transfers on June 4 and 5, 1996.

[7] Despite Respondent's "alarmism" that Petitioners seek review of the "factual record from the 13-day bench trial," (Opp. 14), Petitioners only seek to have this Court clarify the proper scope of FSIA jurisdiction, and remand for discovery and a new trial.

reasonable safeguards to prevent the unauthorized transfer of funds," (SAC, ¶57, Reply App. 13sa). This contract "claim" incorporated, and encompassed, all five unauthorized transfers, which the courts below were bound to consider as one unified claim, "under [Petitioners'] theory of the case," *Nelson*, 507 U.S. at 357, as well as usual pleading rules.

Respondent also attempts to suggest this case is an unsuitable "vehicle" for review, contending "nearly all of the acts complained of . . . did not involve commercial activity in the United States." (Opp. 23.) This contention invites the same error below, through a repudiated half-literal reading of clause one, which does *not* "'require the act complained of to occur in the United States.'" (Pet. 18-19)(citations omitted). To the extent Respondent contends this action is not based upon activity that had "substantial contact" with the United States, the record is otherwise. The following significant facts and allegations are part of the record below:

a) Bank letter offering to safeguard funds was meant for and received by "the American party" in Nevada (Pet. App. 78a, 102a; Pet. 4, 29 n.2);[8]

b) contract was "created . . . in the United States" as "[t]he district court agreed" (Pet. App. 28a n.18);

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[8] Despite Respondent's contentions, (Opp. 4-6), while this letter was "addressed and given to Yue in China," (Pet. App. 39a), it was "addressed" to Yue of "Sino-U.S. Joint Venture Henan Wil-Bao," (Pet. App. 78a), "acting as Wil-Bao's general manager," (Pet. App. 6a), and its assurances were meant for "the American party," (*id.*), as its author admitted. (Pet. App. 102a.)

c) letter induced the American party to wire funds from the United States (*Id.;* Pet. App. 50a-51a & n.29);

d) "Plaintiffs initiated [transfer] of US$ 3 million" "through [branch] in New York" (FF/CL ¶74, Reply App. 19sa);

e) Bank took custody of the funds in New York (*id.*; *cf.* Pet. App. 100a);

f) performance by two transfers through the New York branch to Nevada, authorized by Jones in Tennessee (Pet. App. 13a, 29a; SAC ¶26, Reply App. 7sa-8sa);

g) breaches through five unauthorized transfers, (SAC, ¶¶28-32, Reply App. 8sa-9sa), including the third transfer to Utah through the New York branch (Pet. 12, Pet. App. 100a);

h) omissions to obtain Jones' authority in Tennessee for five unauthorized transfers (Pet. App. 26a n.17).

4. Finally Respondent urges that the analysis "should focus on the text of the [sic] 28 U.S.C. § 1605(a)(2)," as "the 'substantial contact' component of 28 U.S.C. § 1603(e) is irrelevant" herein. (Opp. 23-25.) Such an approach miscasts the statute, and by positing the wrong clause one standard, can only

reach the wrong result, as demonstrated by this case.[9]

The analysis requires focus not just on the text of § 1605(a)(2), but of its definition, § 1603(e), that Respondent would disregard. *See* note 4, *supra.* It also requires concern for statutory purpose, set out in § 1602 ("protect the rights of . . . litigants"), and § 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual"). This Court, by Justice Scalia, unanimously affirmed a decision that noted: "We have cautioned that . . . courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign.'" *Republic of Argentina v. Weltover, Inc.*, 941 F.2d 145, 151 (2d Cir.), *aff'd*, 504 U.S. 607 (1992). In *Nelson*, Justices Stevens and White suggested a similar "touchstone":

> If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be the touchstone of our inquiry; for as Justice White explains, when a foreign nation . . . seeks out the benefits of the private marketplace, it must, like any private party, bear the . . . responsibilities imposed by that marketplace.

507 U.S. at 379 (Stevens, J., dissenting).

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[9] This precedent, unless reviewed by the Court, will lead to further such results, much as the Tenth Circuit relied on *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) throughout the decision below, (Pet. App. 22a-24a, 36a-37a), and no doubt its *dicta* stating the same wrong standard for clause one. (Pet. 21.)

## CONCLUSION

None of Respondent's objections casts doubt on this case's appropriateness for resolving widening conflicts, and important and persistent questions of federal law, which directly undermine the purposes of the FSIA. The petition for writ of certiorari should be granted.

# APPENDIX

## SUPPLEMENTAL APPENDIX A

## ERRATA FOR PETITION APPENDIX CITATIONS

| Petition Page | Citation | Corrected Citation |
|---|---|---|
| p. 2 | App. 134a-14-a | App. 134a-140a |
| p. 8 | App. 93a-96a | App. 93a-95a |
| p. 9 | App. 104a-105a | App. 103a-105a |
| p. 10 | App. 74a | App. 74a-76a |
| p. 12 | App. 53a | App. 42a |
| p. 23 | App. 24a-26a | App. 25a |

# SUPPLEMENTAL APPENDIX B
# EXCERPTS FROM SECOND AMENDED COMPLAINT
# Filed May 18, 2004

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**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

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|---|---|
| ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO., LTD. | : Case No. 2:98CV00238J |
| Plaintiffs | : **SECOND AMENDED COMPLAINT** |
| v. | : |
| BANK OF CHINA, *et al.* | : |

: Judge Bruce S. Jenkins

Defendants. :

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COMES NOW, for their causes of action against Defendants and each of them, Plaintiffs Orient Mineral Company and Wil-Bao Mineral Co. Ltd. complain and allege as follows:

* * *

## BACKGROUND

9. In June 1995, plaintiff Orient Mineral entered into an agreement with Jiaocun Gold Co. of the People's Republic of China, to form a joint venture known as Wil-Bao Mineral Co. Ltd., for the purpose of mining gold in the People's Republic of China.

### A. Yue's Scheme with Bank of China

10. By commitment letter of May 14, 1996, received by Orient Mineral in Nevada, the Bank of China offered and represented that it would be responsible for safekeeping Orient Mineral funds remitted to a suspense account in its name, subject to its control, and that funds in the account would be disbursed to Wil-Bao in accordance with the arrangements and instructions of Orient Mineral's representative. Accepting this offer by letter and board resolution of May 16, 1996 designating Preston Jones as its representative, and in reliance on the Bank's representations, Orient Mineral wired

US $3 million to the Bank's branch in Ling Bao, China. These funds were wired through its New York branch, and received into the Orient Mineral suspense account in Ling Bao on or about May 27, 1996.

11. On May 27, 1996, representatives of Orient Mineral and Wil-Bao, including Mr. Jones as special director of each, met with three senior officers of the Bank's Lingbao branch: Wang Yin Chuan, Deputy Branch Manager; Liu Lin, Head of Accounting and Business Departments; and Zhou Xiuxia, Deputy Head of Business Department.

12. At this meeting, the Bank was presented with the May 16, 1996 letter and board resolution of Orient Mineral, identifying Preston Jones as its sole and exclusive representative, and agreeing to hold the Bank harmless provided it followed the directions of Preston Jones.

13. By these two documents from Orient Mineral, which were translated by branch staff, the three Bank officers knew that Mr. Jones was the sole and exclusive representative of Orient Mineral for arranging the disposition of its funds. The Bank officers also knew from these documents that the Americans were concerned about possible misuse of the funds by local Chinese including Yue, and further of the clear risk to the customer that absent a control facility for transferring the funds to Wil-Bao as needed, the funds would be within the exclusive control of Yue as its General Manager.

14. Despite having branch staff translate the Orient Mineral documents identifying Preston Jones as its sole and exclusive representative, and having clear contractual and professional duties to follow his directions, the three bank officers did not use the same branch staff for understanding and following the instructions of Preston Jones.

15. Instead, the three bank officers used and relied upon Yue as interpreter for the instructions of Preston Jones, and purportedly determined that Preston Jones wished to transfer the entire US $3 million all at once to the Wil-Bao USD account.

16. The three bank officers did this even though they knew the clear risk of transferring the funds to the exclusive control of Yue, and were purportedly quite surprised that Preston Jones did not follow the common practice of foreign investors of maintaining their investment funds in a suspense account for transfer as needed to a Chinese joint venture.

17. In fact, the actual intent and directions of Preston Jones, on behalf of Orient Mineral, were to maintain the suspense account in Orient Mineral's name, or to open a new Orient Mineral account as a control account, in each case subject to his control for all transfers as needed to Wil-Bao. Failing that, his actual intent and direction was, alternatively, to establish a $25,000 restricted Wil-Bao USD account, subject to his approval and control.

18. Further, the actual intent and directions of Preston Jones, on behalf of Wil-Bao, were to establish a $25,000 restricted Wil-Bao USD account, subject to his approval and control.

19. In support of his alternative direction, Preston Jones provided a resolution of the board of directors of Wil-Bao, in Chinese and English, stating that any withdrawals or transfers in excess of $25,000 from the account to be opened with the Bank required the signature of Preston Jones. The Bank of China accepted and promised to observe such restrictions and conditions on the account to be opened.

20. In addition to failing to follow any of the directions given by Preston Jones, the three bank officers did not perform any normal "know-your-customer" due diligence at the May 26, 1996 meeting, including, but not limited to: determining customer intentions; understanding and following customer directions; following policy and procedure to utilize available English-competent staff; exercising normal vigilance to avoid fraud; advising customers of regulatory rules and prohibitions; reviewing documentation provided by the customer and raising regulatory issues and restrictions; and observing a Wil-Bao board resolution or obtaining from the customer an official letter or its equivalent.

21. Instead, the three bank officers permitted the opening and operation of a Wil-Bao USD foreign exchange account without a required registration certificate issued by the State Administration for Exchange Control ("SAEC") of

the central bank of China, which was in violation of strict SAEC regulations and bank policy.

22. In the absence of an SAEC registration certificate, the bank officers further failed to follow the alternative procedure mandated by SAEC regulations and bank policy, of allowing only a temporary USD account, also approved by SAEC, with a complete block on transfers for ninety days, after which it was required to have been closed.

23. The bank officers also failed to ensure that Wil-Bao obtain SAEC approval to convert the USD account that was opened to a capital account and, following SAEC approval to effect the re-registration by September 30, 1996, or close the account as required by SAEC regulations.

24. In each instance, the Bank thereby avoided SAEC oversight over the account.

25. Based upon the above acceptances, promises and representations, Orient Mineral and Wil-Bao entered into banking contracts with Bank of China, and, thereafter, transferred the sum of $2,999,990 from the Orient Mineral suspense account into the Wil-Bao USD account, fully believing that the Bank had followed Preston Jones' alternative direction that said account bear a $25,000 restriction, subject to his authorization and control.

26. On May 29, 1996, pursuant to that direction and $25,000 restriction, Preston Jones gave written authorization to Mr. Wang, Deputy General

Manager of the Bank's Ling Bao branch, for the transfer of US $1.215 million from the Wil-Bao USD account to its RMB account for specified purposes. Preston Jones thereafter signed and forwarded other authorization letters addressed to the Ling Bao branch authorizing the transfer of $135,000 and $63,250, respectively.

27. Notwithstanding the above acceptances, promises and representations of the Bank of China, within a few months after the Wil-Bao USD account was opened, approximately US $1.8 million dollars was improperly withdrawn from the account through a series of transfers and other withdrawals initiated by Yue but without the proper authorization of Wil-Bao, Orient Mineral or Preston Jones.

28. Among the improper transfers were two illegal conversions to local RMB currency of $50,000 and $40,000 on June 4 and June 5, 1996, respectively, permitted and effected by the Bank of China during the first week of account opening, without the approval of the SAEC.

29. Other improper transfers were four withdrawals also allowed within days and weeks of account opening, totaling $178,225 (in local RMB currency) to a fashion shop and a pharmaceutical company. Such transfers were suspicious on their face as bearing no relation to the stated mining purposes of the Wil-Bao joint venture, as known to the Bank's officers.

30. The bank officers further permitted a wire transfer in the sum of $400,000 to an account

maintained by Defendant Saren Gaowa at Zions First National Bank in Salt Lake City, Utah on or about August 22, 1996. This transfer (as it was later discovered) was initiated by Defendant Yue without the required authorization of Preston Jones. This transfer was illegal and fraudulent on its face, as consisting of the transfer of $400,000 of registered capital belonging to a Sino-U.S. joint venture, Wil-Bao, to an individual without SAEC approval or any documentation, which further was identified as "refund of investment" which only Orient Mineral or its designated agent should receive.

31. The bank officers also permitted the illegal transfer of US $1 million to the Industrial and Commercial Bank of China ("ICBC") on or about October 18, 1996, which they knew was collateral for a loan, which they further knew would constitute illegal access to capital in excess of the approved total investment of the Wil-Bao joint venture.

32. The bank officers permitted another unauthorized transfer of $100,000 on or about May 8, 1997.

33. In sum, Yue improperly transferred or withdrew approximately $1.8 million from the Wil-Bao USD account without the required authorization of Preston Jones. Yue used these funds personally to invest in businesses in which neither Wil-Bao nor Orient Mineral had any interest, or to pay personal expenses of Yue. All the improper transfers or withdrawals made by Yue were done with the knowledge and consent of the Bank of China, Does 1-20, Gaowa and Yue.

34. Presently, Yue is incarcerated in China after having been convicted of criminal charges arising from the embezzlement of funds from Wil-Bao.

## B. Yue's Schemes With Third Parties

### (1) Gaowa

35. The transfer of the funds into the account of Gaowa was done with her knowledge and consent to Yue's scheme to defraud Paintiffs and embezzle funds from them.

### (2) Jiaocun Town

36. The Chinese party to the joint venture, Jiaocun Gold Co., was a government-owned entity formed by Jiaocun Town of Ling Bao City. The town appointed three directors to Wil-Bao on behalf of the Chinese party, including its mayor and another local official, Zhang Fang Xing, who was also Vice General Manager to Yue, the General Manager of Wil-Bao.

37. In late 1995 and early 1996, Yue and Mr. Zhang traveled to Salt Lake City, Utah and San Francisco, California, for purposes, *inter alia*, of assuring Orient Mineral and its investor that the Chinese party would perform its obligations, and that the investment of Orient Mineral would be repaid before both parties shared in profits of Wil-Bao. The obligations of the Chinese party included that it would contribute the right to use two mines and land valued at US $900,000 as its 30%

contribution to the US $3 million capital of the joint venture.

38. Neither Jiaocun Town nor Jiaocun Gold Co. held title or rights to the mines and land represented to be their capital contribution to the joint venture, and with Yue, knowingly entered into a conspiracy to defraud Plaintiffs by representing otherwise and inducing Orient Mineral to advance US $900,000 in cash on behalf of the Chinese party, in addition to its own 70% or US $2.1 million cash contribution to the joint venture.

39. Yue and the Chinese party entered into a further conspiracy to defraud Plaintiffs by falsely representing that Jiaocun Town held title and rights in a mill to be purchased for $450,000 from the $3 million investment. On May 29, 1996, Preston Jones authorized such funds to be transferred from Wil-Boa's USD account to its RMB account, but such purchase never occurred, and Yue and/or Jiaocun Town diverted the funds for their own purposes.

* * *

**(4) <u>ICBC Complicit Fraudulent Transaction and Illegal Account</u>**

41. In October 1996, Yue conspired with bank management of ICBC to illegallyaccess approximately one million dollars equivalent in RMB by transferring USD $1 million of Wil Bao capital from Bank of China and pledging these funds as collateral for an RMB loan.

42. Such a loan constituted a violation of the restrictions of Wil Bao's investment approval and licenses because it allowed the joint venture (by Yue) to access funds in excess of the $3 million in capital, which had fully capitalized its approved investment.

43. In so doing, ICBC further permitted, in violation of central bank regulations, the establishment by Wil Bao of a second "basic" RMB account.

44. The effect of both actions by ICBC, with the knowledge of the Bank of China, was to aid and abet an attempt by Yue to embezzle an additional $1 million from Wil Bao, as part of an unauthorized and illegal transfer on October 18, 1996 of $1 million from the Bank of China to the ICBC.

**FIRST CAUSE OF ACTION**

(Fraud and Misrepresentation Against Defendants Yue, Bank of China and Does 1-20)

* * *

51. With the knowledge that such transfers were in violation of the Orient Mineral and Wil-Bao agreements, the Bank of China and Does 1-20 actively assisted Yue in making numerous withdrawals and transfers in excess of $25,000 without the consent of Preston Jones. Moreover, Yue made numerous other withdrawals from the Wil-Bao account in amounts less than $25,000 that were not used for any purpose authorized by Wil-Bao. These transfers, too, were made by the Bank and with the

actual knowledge of the Bank and Does 1-20 that such transfers were in violation of Yue's fiduciary duties to Plaintiffs.

* * *

**SECOND CAUSE OF ACTION**

(Breach of Contract Against Defendant Bank of China)

* * *

57. Bank of China breached the aforementioned duty to Orient Mineral by, among other things, (a) failing to follow directions given by Preston Jones as its sole and exclusive representative to maintain its suspense account or open a new Orient Mineral account, or alternatively to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control, and (b) failing to take reasonable safeguards to prevent the unauthorized transfer of funds from the Wil-Bao USD account by Yue.

* * *

**THIRD CAUSE OF ACTION**

(Negligence Against Bank of China)

66. Bank of China breached the aforementioned duties to Orient Mineral by, among other things, (1) failing to follow directions given by Preston Jones as its sole and exclusive representative to maintain its suspense account or

open a new Orient Mineral account, or alternatively to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control; (2) failing to be alert to suspicious circumstances and fraud on account opening and upon transfer of the full $3 million from the suspense account to the Wil-Bao USD account, relying on the interpretation of Yue, who would thereby possess exclusive control; (3) failing to take reasonable safeguards to prevent the unauthorized transfer of funds from the Wil-Bao USD account by Yue in light of the facts known to the Bank at the time of the transfers; and (4) failing to raise regulatory issues or restrictions that required that the transfer not be made, and that regulatory approval was required.

* * *

**FOURTH CAUSE OF ACTION**

(Conspiracy to Commit Fraud Against Yue, Gaowa Bank of China and Does 1-20)

* * *

70. In or about May 1996, and continuing thereafter, the Defendants and each of them knowingly entered into a conspiracy to defraud Plaintiffs and deprive Plaintiffs of valuable property rights. Overt acts in furtherance of the conspiracy include, but are not limited to:

(1) the May 14, 1996 Bank of China commitment letter prepared by Liu for Yue,

intended to induce Orient Mineral to transfer US $3 million from the United States to the Ling Bao branch of the Bank of China;

(2) a staged meeting with the three bank officers on May 27, 1996 to effect the transfer of $3 million from Orient Mineral's control to Wil-Bao's USD account subject to Yue's control;

(3) the total failure by the three bank officers to perform normal "know-your-customer" due diligence at the meeting, and to advise of or raise any regulatory issues or restrictions;

(4) the utter failure to follow any of Orient Mineral's alternative directions given by Preston Jones, which the bank officers knew was its sole and exclusive representative;

(5) the utter failure to follow Wil-Bao's directions given by Preston Jones;

(6) the illegal opening and operation of the Wil-Bao USD foreign exchange account without a required SAEC registration certificate, failure to open instead an SAEC-approved temporary USD account with a complete block on transfers, and failure to convert the USD account to a capital account by September 30, 1996 or close the account, thereby avoiding SAEC oversight in each instance;

(7) the complicit failure to exercise regulatory oversight in permitting illegal conversions of USD foreign exchange to local RMB currency, without SAEC approval, within days of account opening;

(8) the illegal permitting of transfers that were fraudulent on their face, and repeated, complicit failure to exercise regulatory oversight, including but not limited to: (a) the transfer of $400,000 of company foreign exchange capital to an individual without SAEC approval or any documentation, which further was identified as "refund of investment" which only Orient Mineral or its designated agent should receive, and (b) the transfer of US $1 million to the ICBC which the bank officers knew was collateral for a loan, which they further knew would constitute illegal access to capital in excess of the approved total investment of the Wil-Bao joint venture; and

(9) highly suspicious conduct inconsistent with professionalism, including failure to maintain key documents and translations in bank files, and incredible and specious justifications for failures, lapses of regulatory oversight, and illegal misconduct.

* * *

## NINTH CAUSE OF ACTION

(Negligent Misrepresentation Against Bank of China and Does 1-20)

100. The Bank, however, either did not understand the instructions, resolutions and restrictions on the account or did not have adequate safeguards in place to prevent the unauthorized withdrawals by Yue. Either way, the Bank negligently represented to Plaintiffs that it would not allow (a) an Orient Mineral suspense or other control account, and (b) withdrawals from the Wil-Bao USD account other than as instructed by Preston Jones or as set forth in the resolutions presented to it. The representations were made with the intent of inducing (a) Orient Mineral to transfer funds from the United States to the Ling Bao branch, and/or (b) Plaintiffs to transfer funds into the Wil-Bao account. Had Plaintiffs known that the Bank did not understand the directions of Preston Jones, or have adequate safeguards in place to prevent unauthorized withdrawals, or that the Bank did not understand the instructions contained in the resolutions, Plaintiffs would not have opened the Orient Mineral suspense account or the Wil-Bao USD account or transferred any funds into them.

* * *

## SUPPLEMENTAL APPENDIX C — EXCERPTS FROM DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED JANUARY 26, 2005

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

Civil No. 2:98-CV-238J

ORIENT MINERAL COMPANY, and WIL-BAO MINERAL CO., LTD.,

Plaintiffs,

vs.

BANK OF CHINA, DAVID YUE aka YIAOQUN YUE, and SAREN GAOWA,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW (FED. R. CIV. P 52(a)) AND ORDER RE: PENDING MOTIONS**

* * *

74. After the loan documents had been executed, Plaintiffs initiated the wire transfer of the US$ 3 million to China on May 21, 1996, through the Bank of China's branch office in New York. (PX-148, PX-149; Tr. 417104 Rm., at 69:7-72:9 (Mr. Jones)).

* * *

427. The conduct of the persons present at the May 27th meeting is consistent with the inference that Mr. Yue did not communicate to Mr. Wang, Mme. Liu or Mme Thou any directions by Mr. Jones concerning limitations to be imposed upon expenditures from the Wil-Bao U.S. dollar account, and is likewise consistent with the finding based upon Mr. Wilson's trial testimony that the May 24th Wil-Bao board resolution was presented to Mr. Wang at the May 29th meeting, not at the meeting on May 27th. . . .

* * *

429. In contrast to the May 16th board resolution and cover letter designating Jones as Orient Mineral's sole authorized representative in dealing with Orient Mineral's wired funds (PX-8), nothing presented to the Bank at the May 27th meeting designated Jones as *Wil-Bao's* "special director" with equivalent authority over the opening of, or transactions to be conducted in the Wil-Bao U.S. dollar account. Absent that, designation in a communication addressed to the Bank, the Bank's

officers present at the May 27th meeting were not alerted to any specific need to ascertain the intentions of Mr. Jones concerning the *Wil-Bao* account through direct communication with Jones, in contract to following Wil-Bao's directions as communicated to the Bank by or through Wil-Bao's general manager and director, Mr. Yue – all in the presence of Wil-Bao's chairman and director (Wilson), its director and legal counsel (Eck), and a fourth director (Jones), each of whom had been introduced to the Bank officers at the meeting.

* * *